No. 92-169

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ROBIN GANSLEY MITCHELL; ARTHUR J. BENVENISTE; WALTER J. BORDEN; CONRAD J. CHAVEZ; LOUIS SEIVERDING CORTEZ; SCOTT D. EVANS; ELIZABETH S. FORSBERG; HAROLD A. GIANCANELLI; VERA E. LEVEQUE; JOYCE A. MACKIE; BRUCE J. MACKIE; JOYCE MCCANN; ANN M. NORTON; JOHN W. NORTON; JANET L. ROTHENBERG; CHERYL SHAPIRO; RALPH J. STAM; ALICE C. TURNER; and ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

UNITED TEACHERS-LOS ANGELES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 1992

QUESTION PRESENTED

In *R.A.V. v. City of St. Paul*, ___ U.S. ___, 60 U.S.L.W. 4667, 4670 (U.S. June 22, 1992) (No. 90-7675), this Court held that the First Amendment does not permit government to "regulate * * * based on * * * favoritism [ ] towards the underlying message expressed." In *Chicago Teachers' Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303, 305 (1986), this Court held that both government and unions which seek to collect compulsory fees from represented nonunion public employees are required to establish procedural safeguards "tailored to minimize the [First Amendment] infringement," *e.g.*, of "being compelled to subsidize the propagation of political or ideological views that they oppose." *Hudson* applied this Court's traditional requirement that these procedures minimize the infringement by being the "'least restrictive of freedom of belief and association,'" *Id.* at 303 & n.11, *quoting Elrod v. Burns*, 427 U.S. 347, 363 (1976).

The question presented by this case is:

Do the First and Fourteenth Amendments permit a public employer to favor and assist the political, ideological, and other nonbargaining activities of a union by agreeing to automatically seize monies for these activities from its public employees who are subject to a compulsory "agency shop" agreement, but who are **not members** of the union, when the **nonunion** employees have neither authorized, nor objected to, the seizure of their monies for these political, ideological, and other nonbargaining activities?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below included Betty Anne Sikking, a Plaintiff-Appellee, who is now deceased.

Additionally, the Los Angeles Unified School District and Robert Booker, Chief Business and Financial Officer ("the LAUSD Defendants"), were Defendants to the original proceeding in the United States District Court for the Central District of California.[1] However, only Defendant United Teachers-Los Angeles timely appealed from the district court's judgment and injunction against all Defendants. Accordingly, the LAUSD Defendants were not parties to the proceeding whose judgment is sought to be reviewed. *See* Appendix ("App.") A, *infra* 3a (*Mitchell v. Los Angeles Unified School Dist.*, 963 F.2d 258, 259-60 (9th Cir. 1992)).

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[1] Two other original Defendants, Leonard M. Britton, Superintendent for the LAUSD, and Jon Campbell, Personnel Director for the LAUSD, were dismissed from the action by stipulation of the parties prior to the district court's entry of judgment. District Court Record ("R") 10, *Stipulation & Order*.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THIS COURT SHOULD SETTLE THE FIRST AMENDMENT QUESTION PRESENTED BY THIS CASE BECAUSE OF ITS EXCEPTIONAL IMPORTANCE TO THE MILLIONS OF NONMEMBER EMPLOYEES REPRESENTED BY UNIONS, THE WIDESPREAD DISTORTION THE PANEL'S DECISION WILL HAVE ON THE POLITICAL PROCESS AND FIRST AMENDMENT FREEDOMS, AND THE PANEL'S CONFUSION IN APPLYING TO *NONMEMBERS* THIS COURT'S HOLDING THAT *UNION MEMBERS'* "DISSENT IS NOT PRESUMED" 8

TABLE OF CONTENTS (continued)

Page

II. THE PANEL'S DECISION ALLOWING A UNION AND A PUBLIC EMPLOYER TO SEIZE POLITICAL AND IDEOLOGICAL FEES FROM NONMEMBERS IN EXCESS OF THE *PRO RATA* COST OF COLLECTIVE BARGAINING, WITHOUT THEIR AFFIRMATIVE CONSENT, CONFLICTS WITH THE DECISIONS OF THIS COURT 13

A. The Conflict With This Court's Decisions Requiring the "Least Restrictive Means" Be Used When a Compelling State Interest Justifies an Infringement on First Amendment Rights 13

B. The Conflict With This Court's Decision in *Hudson* 20

C. The Conflict With This Court's Decisions Concerning the Waiver of Fundamental Constitutional Rights 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) ..... *passim*

Attorney General v. Soto-Lopez,
476 U.S. 898 (1986) 15

Branti v. Finkel, 445 U.S. 507 (1980) 11

Buckley v. Valeo, 424 U.S. 1 (1976) 11

Chicago Teachers' Union, Local No. 1 v. Hudson,
475 U.S. 292 (1986) ..... *passim*

City of Madison Joint School Dist. No. 8
v. Wisconsin Employment Relations
Comm'n, 429 U.S. 167 (1976) 9

Cohen v. California, 403 U.S. 15 (1971) 17, 26

Communications Workers v. Beck, 487 U.S. 735 (1988) . 10, 14

D.H. Overmyer, Inc. of Ohio v. Frick Co.,
405 U.S. 174 (1972) 24

Ellis v. Railway Clerks,
466 U.S. 435 (1984) 9, 10, 15

Elrod v. Burns, 427 U.S. 347 (1976) ..... *passim*

Federal Election Comm'n v.
Massachusetts Citizens for Life, Inc.,
479 U.S. 238 (1986) 15

TABLE OF AUTHORITIES (continued)

Page

Federal Election Comm'n v. National Educ. Ass'n, 457 F. Supp. 1102 (D.D.C. 1978) 17-20

Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982) 18, 23

Hohe v. Casey, 128 F.R.D. 68 (M.D. Pa. 1989) 10

Johnson v. Zerbst, 304 U.S. 458 (1938) 23

Keller v. State Bar, ___ U.S. ___, 110 S. Ct. 2228 (1990) 8-10

Lehnert v. Ferris Faculty Ass'n, ___ U.S. ___, 111 S. Ct. 1950 (1991) 8-10, 14

Machinists v. Street, 215 Ga. 7, 108 S.E.2d 796 (1959) 13

Machinists v. Street, 367 U.S. 740 (1961) . . . . . *passim*

NAACP v. Alabama, 357 U.S. 449 (1958) 15

North Carolina v. Butler, 441 U.S. 369 (1979) 24, 25

Ohio Bell Telephone Co. v. Public Utilities Comm., 301 U.S. 292 (1937) 24

Pipefitters Local 562 v. United States, 407 U.S. 385 (1972) 19

TABLE OF AUTHORITIES (continued)

Page

R.A.V. v. City of St. Paul,
___ U.S. ___, 60 U.S.L.W. 4667,
4670-71 (U.S. June 22, 1992)
(No. 90-7675) ..... *passim*

Railway Clerks v. Allen, 373 U.S. 113 (1963) 14, 21

Rutan v. Republican Party, ___ U.S. ___,
110 S. Ct. 2729 (1990) 9

Schneckloth v. Bustamonte, 412 U.S. 218,
93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) 23

Simon & Schuster, Inc. v. Members of the
New York State Crime Victims Board,
___ U.S.___, 112 S. Ct. 501 (1991) 12

Speiser v. Randall, 357 U.S. 513 (1958) 11

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV 2-4

28 U.S.C. § 1254(1) (West Supp. 1990) 2

28 U.S.C. §§ 1331 and 1343
(West Supp. 1991) 5

Federal Election Campaign Act of 1971,
2 U.S.C. § 441b(b)(3)(A). 17

TABLE OF AUTHORITIES (continued)

Page

National Labor Relations Act,
29 U.S.C. § 151 10

Civil Rights Act of 1871,
42 U.S.C. § 1983 (West 1982) 2-3

Railway Labor Act, 45 U.S.C. § 151 9-10

California Educational Employment Relations Act,
Cal. Gov. Code § 3540.1(i)(2)
(West Supp. 1992) 3
Cal. Gov. Code § 3546 (West 1980) 3

RULES

Fed. R. Civ. P. 23(c)(2) 16

Rules of the United States Supreme Court,
Rule 13.1 2

MISCELLANEOUS

James T. Bennett "*Private Sector Unions: The Myth of Decline*," 12 *J. Lab. Res.* 1
(Winter 1991) 10

Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Union Security and Dues Checkoff Provisions* 5 (1982) 10

Public Employee Bargaining, ¶ 5500 (CCH 1990) 10

TABLE OF AUTHORITIES (continued)

Page

The Supreme Court, 1976 Term,
91 Harv.L.Rev. 1, (1977) 20

Union Membership Unchanged at 16.1 Percent of Employment In 1991, Daily Lab. Rep. (BNA) No. 28, B-1 (Feb. 11, 1992) 10

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ROBIN GANSLEY MITCHELL, *et al.*, and
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Petitioners,

v.

UNITED TEACHERS-LOS ANGELES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Robin Gansley Mitchell, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on April 29, 1992.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") A, *infra* 1a-9a) is reported at 963 F.2d 258. The unreported judgment of the United States District Court for the Central District of California is reproduced as Appendix B, *infra* 10a.

The district court's opinion and order (App. C, *infra* 14a-26a) is reported at 744 F. Supp. 938.[2]

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1992. Pursuant to Supreme Court Rule 13.1, this Petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (West Supp. 1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Civil Rights Act of 1871, 42 U.S.C. § 1983 (West 1982), provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

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[2] An earlier opinion of the district court not necessary to ascertaining the grounds of the judgment sought to be reviewed, the basis for federal or appellate jurisdiction, or to reviewing the question presented is reported at 739 F. Supp. 511 (denying the school district's motion to dismiss and the teachers union's summary judgment motion).

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The state statute involved is the California Educational Employment Relations Act ("EERA"), Cal. Gov. Code § 3540, *et seq.* Section 3540.1, Cal. Gov. Code § 3540.1(i)(2) (West Supp 1992), provides in pertinent part:

> (i) "Organizational security" means * * * the following:
>
> * * * * *
>
> (2) An arrangement that requires an employee * * * to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement * * *.

Section 3546, Cal. Gov. Code § 3546 (West 1980), provides in pertinent part that "organizational security, as defined, shall be within the scope of representation."

STATEMENT OF THE CASE

Petitioners are eighteen teachers employed by the Los Angeles Unified School District ("LAUSD"). Although not union members, they are employed in a bargaining unit consisting of 36,000 teachers represented exclusively for purposes of collective bargaining by a union, the United Teachers-Los Angeles ("UTLA").[3]

Pursuant to the EERA, Cal.Gov.Code § 3540, *et seq.*, Defendants UTLA and the LAUSD executed an agency shop

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[3] The UTLA is affiliated with the California Federation of Teachers and the American Federation of Teachers ("CFT/AFT"), as well as the California Teachers Association and the National Education Association ("CTA/NEA").

agreement which became effective in January 1990, upon certification by the California Public Employment Relations Board ("PERB"). Under the agreement the LAUSD agreed to automatically seize dues-equivalent agency fees from Petitioners and the other 10,402 teachers who had chosen to exercise their right to refrain from membership in and financial support of the UTLA, and forward those monies to the union for any purpose its members authorized.

Around February 7, 1990, the UTLA sent a notice about the impending dues-equivalent fee seizures to the nonmember teachers. In its notice, the UTLA conceded that 15.4% of its expenditures were for political, ideological and other non-bargaining activities, and that nonmembers were required to fund only the remaining 84.6% of its annual dues of $440.00 that went for collective bargaining activities.

Nevertheless, the notice then stated the nonmember teachers could "voluntarily pay the full UTLA dues." In fact, the "voluntary" desire to "pay" full union dues—with its automatic authorization of the union to speak on behalf of the nonmembers on political, ideological, and other nonbargaining matters—would be presumed unless the nonmembers timely and affirmatively objected in writing:

> If you do not desire to pay a fair share fee equal to the full UTLA dues, you must send a letter * * * to the UTLA office within *30 days* of the mailing date of this notice. * * * If such a letter is not received by the UTLA, then we will presume that you have no objections to being charged the full membership dues [including monies for political, ideological, and other nonbargaining activities].

District Court Record ("R") 1, *Class Action Complaint*, Exhibit D(1), at 35 (emphasis in original).

In response, 2,400 nonmember teachers took the additional step of affirmatively objecting to seizure of full union dues and/or

to the UTLA's calculation of the reduced agency fee. R. 4, *Declaration of Wayne Johnson*, at ¶ 9. Two thousand two hundred and ninety-five teachers joined the union.[4]

Pursuant to the collection procedures, the remaining 5,725 silent nonmembers were treated as though they both **expressly** authorized the union to speak on their behalf on political, ideological, and nonbargaining matters, and "volunteered" to contribute the 15.4% difference between full union dues and the mandatory, collective bargaining agency fee. Accordingly, on March 2, 1990, the LAUSD began the seizure of full union dues from their paychecks.

Through this civil rights class action brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, Petitioners sought injunctive, declaratory, and other relief because Defendants' automatic collection procedures, including the requirement that nonmembers must pursue additional actions to prevent the government's automatic seizure of their monies for the union's political and ideological agenda, failed to provide all of the First Amendment procedural-safeguards required by this Court in *Chicago Teachers' Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).[5]

Specifically, the Complaint alleges that:

> Defendant UTLA's "Notice to Nonmember Bargaining Unit Employee[s]" violates the First, Fifth, and Fourteenth Amendments to the Constitution of the United States * * * by requiring affirmative objection, and

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[4] Those who joined the union are not part of the class certified by the district court. App. C at 17a n.3 (*Mitchell v. Los Angeles Unified School District*, 744 F. Supp. 938, 940 n.3 (C.D. Cal. 1990)). Those who constitute the certified class are the remaining 8,125 nonmember teachers.

[5] The district court therefore had jurisdiction under 28 U.S.C. §§ 1331 and 1343 (West Supp. 1991).

> annual renewal of such objection, to the seizure of an amount equal to full union dues, it presumes affirmation and support of the union's costs in excess of those for collective bargaining, contract administration, and grievance adjustment.

R. 1, ¶ 39; *See also* R. 26, *Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment*, at 21-26.

The district court held that the presumption of consent to supporting the union's political, ideological and other nonbargaining activities because of a nonmember's silence is constitutionally impermissible.

> The UTLA's seizure of amounts in excess of an agency fee collides with fundamental tenets governing waiver of constitutional rights. In this regard, the very purpose of *Hudson* is to safeguard the First Amendment interests of non-union employees. It is settled that a non-union member can be forced to share in the expenses incurred by a union in its role as the sole bargaining representative of employees within the bargaining unit. * * * Yet, non-union members cannot be forced to pay for expenses related to political and ideological activities unrelated to the costs of representation. *Hudson*, 475 U.S. at 302.
>
> * * * *
>
> [T]he Court holds that the non-union employees, merely because they did not file an objection, cannot be deemed to have intentionally abandoned a known right or to have consented to an abridgment of their First Amendment interests. In sum, non-union members cannot be deemed by silence to have consented to a deduction from their paychecks greater than the compulsory agency fee.
>
> * * * *

> In the Court's view, before an employee's salary can be diminished on the basis of a voluntary contribution, the employee must, in deference to his First Amendment interests, affirmatively consent to the deductions.

App. C at 20a, 21a, 23a (other citations omitted) (*Mitchell*, 744 F. Supp. at 941, 942, 943).

Holding that the First Amendment requires more than just an opportunity for nonmembers to object, it requires the nonmember's affirmative consent to the payment of the non-chargeable political and ideological monies, the district court permanently enjoined the UTLA and the LAUSD Defendants from seizing an amount greater than each nonmember's *pro rata* share of the union's chargeable costs of collective bargaining, unless the nonmember affirmatively consented in writing to payment of monies for the union's political, ideological and other nonbargaining activities.[6] App. B at 12a-13a.

The UTLA timely filed a notice of appeal, R. 63, from the permanent injunction.

The Ninth Circuit reversed, holding that the government may presume that silent nonmember employees have authorized a

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[6] The district court's permanent injunction stated: "All defendants are permanently enjoined from collecting more than the agency fee from any non-union member, unless the employee affirmatively consents in writing to deduction of full union dues." App. B at 13a. The district court also recognized the union's right "to solicit contributions equal to full union dues and obtain affirmative written consents for deductions in excess of 84.6% of union dues" from nonmembers. App. C. at 22a n.7, 26a and n.11 (*Mitchell*, 744 F. Supp. at 943 n.7, 944 & n.11).

Thus, while the injunction prevented the LAUSD from automatically seizing nearly $400,000 annually for its political and ideological use from the 5,725 nonmembers who had not responded to the UTLA's notice, it specifically allowed the union to continue to seize from nonmembers the more than $3,000,000 annually it claimed to need for collective bargaining purposes.

private organization, the union, to speak on their behalf and accordingly may automatically seize fees for the union's political and ideological activities from these silent nonmembers. The panel reversed even though these silent nonmembers have not associated with or consented to financially supporting any aspect of the union's agenda — let alone the political and ideological aspects for which this Court has consistently held support cannot be compelled. Nevertheless, the court of appeals felt justified in holding that this presumption is constitutionally permissible because it erroneously believed this Court has repeatedly held "that nonunion members' rights are adequately protected when they are given the opportunity to object to such deductions and to pay a fair share fee to support the union's representation costs." App. A at 6a. (*Mitchell*, 963 F.2d at 261.)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD SETTLE THE FIRST AMENDMENT QUESTION PRESENTED BY THIS CASE BECAUSE OF ITS EXCEPTIONAL IMPORTANCE TO THE MILLIONS OF NONMEMBER EMPLOYEES REPRESENTED BY UNIONS, THE WIDESPREAD DISTORTION THE PANEL'S DECISION WILL HAVE ON THE POLITICAL PROCESS AND FIRST AMENDMENT FREEDOMS, AND THE PANEL'S CONFUSION IN APPLYING TO *NONMEMBERS* THIS COURT'S HOLDING THAT *UNION MEMBERS'* "DISSENT IS NOT PRESUMED"

In two of its last three Terms, this Court has reaffirmed the limits placed upon government and private organizations which, because of the compelling state interests that they serve, are sanctioned by the government to compel financial support for some, but not all, of their activities. *Lehnert v. Ferris Faculty Ass'n*, ___ U.S. ___, 111 S. Ct. 1950, 1959-65 (1991) (unions); *Keller v. State Bar*, ___ U.S. ___, 110 S. Ct. 2228, 2233-37 (1990) (state bar associations). In both cases, this Court held that the

collection and use of an individual's monies for political and ideological activities outside of the compelling state interest justifying the infringement inherent in such compelled association impermissibly violates the First Amendment rights of free association, petition and speech.

Similarly, in *Hudson*, 475 U.S. at 303, 310, this Court held that due process and the First Amendment require the government and unions to tread with sensitivity in this area and provide nonmembers with certain procedural protections before any agency fees may be collected. *See also Keller*, 110 S. Ct. at 2237-38 (similar protections must be provided in the context of the unified state bar).[7] Moreover, "[t]he importance of these issues" caused the Court to grant certiorari. *See Lehnert*, 111 S. Ct. at 1956; *Hudson*, 475 U.S. at 294, 300.

This Court has consistently ruled that employees may not be compelled to financially support unions' political and ideological activities. *Abood*, 431 U.S. at 235; *Lehnert*, 111 S. Ct. at 1959-65. Now, the record in this case presents the collateral question of whether a public employer may encourage and assist such union activities by automatically seizing monies for these activities from nonmembers' unless they annually and affirmatively object to supporting these sensitive activities.

This is a critical question due to the large number of public employees whose First Amendment freedoms and interests are

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[7] Prior to that, this Court addressed the constitutional limits on the power of government and unions to act under an agency shop agreement in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) (applying to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (applying to state and municipal employment). More broadly, this Court has on a number of occasions dealt with other aspects of free speech rights of public employees. *See, i.e., Rutan v. Republican Party*, ___ U.S. ___, 110 S. Ct. 2729 (1990); *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976); *Elrod v. Burns*, 427 U.S. 347 (1976).

burdened by compulsory unionism arrangements.[8] In this case alone, the district court certified a class of more than 8,000 nonunion teachers in the Los Angeles Unified School District. In *Hohe v. Casey*, 128 F.R.D. 68, 72 (M.D. Pa. 1989), a class of 18,000 nonunion Commonwealth of Pennsylvania employees was certified. And, of course, the Court's disposition of this question would also be precedential in other "agency shop" contexts, including those under the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, and those arising under the Railway Labor Act,[9] *see also Keller*, 110 S. Ct. at 2235-36; *Lehnert*, 111 S. Ct. at 1956-59; *Communications Workers v. Beck*, 487 U.S. 735 (1988) at 762; *Ellis*, 466 U.S. at 443, 455-56.

Moreover, this case is exceptionally important for reasons other than the thousands of individuals directly affected, or even the precedential value of this case on the millions affected by compulsory unionism. If allowed to stand, the panel's approval of compelling silent nonmembers to fund the union's political,

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[8] As of 1990, some form of compulsory unionism was authorized for public employees in twenty-three states and the District of Columbia. *Public Employee Bargaining*, ¶ 5500 (CCH 1990).

[9] The approximately 2.2 million nonunion employees represented by unions are divided evenly between the public and private sectors, *Union Membership Unchanged at 16.1 Percent of Employment In 1991*, Daily Lab. Rep. (BNA) No. 28, at B-1 (Feb. 11, 1992). Approximately 80% of the employees falling under the jurisdiction of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* are subject to agency shop arrangements with private employers. Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Union Security and Dues Checkoff Provisions* at 5. (1982). Unfortunately, no similar statistics exist for the public sector. Applying the UTLA's concession that 15.4% of its expenditures are for political, ideological, and other nonbargaining activities to the approximate number of private-sector nonmembers covered by agency shop arrangements, and assuming the average annual dues are $444.00, James T. Bennett "*Private Sector Unions: The Myth of Decline*," 12 *J. Lab. Res.* 1, 4 (Winter 1991), it is apparent the panel's approval of the government-aided union fee collection system results in an annual $60 million political and ideological fund seized from silent private-sector nonunion employees who have never agreed to fund such speech, nor authorized any union to speak for them.

ideological, and other noncollective bargaining activities can only result in widespread distortion of the political and legislative processes. *Cf. Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (*per curiam*) (government has primary interest in prevention of corruption and appearance of corruption in electoral process).

"Conditioning public employment on partisan support prevents support of competing political interests." *Elrod*, 427 U.S. at 356.

> Given the increasingly pervasive character of government employment, * * * the power to starve political opposition by commanding partisan support, financial and otherwise, may have a significant [distorting] impact on the formation and expression of political beliefs.

Branti v. Finkel, 445 U.S. 507, 513 n.8 (1980). Accordingly, freedoms guaranteed by the First Amendment are "rights which we value most highly and which are essential to the workings of a free society," *Speiser v. Randall*, 357 U.S. 513, 521 (1958), so that government must "tread[ ] with sensitivity" in these areas. *Hudson*, 475 U.S. at 303 n.12.

However, the panel below failed to tread with the required sensitivity in this area of First Amendment rights which are essential to the workings of a free society because it was confused about this Court's previous references that "dissent is not presumed." *Machinists v. Street*, 367 U.S. 740, 774 (1961). *See* discussion, *infra* at 12-14. Although it has not directly and intentionally decided the question, this Court must now settle whether its reasonable refusal in *Street* to presume that voluntary union members would dissent from the union's political and ideological activities applies equally and with the same result to the decidedly different situation in this case of nonmembers — employees who have failed or in many cases refused to voluntarily join the union and authorize it to act on their behalf. Otherwise, as shown by the confusion of the panel below, courts will believe this Court has sanctioned the quashing of silent nonmembers'

First Amendment rights by allowing the government to favor and assist the funding of one set of competing political and ideological interests over another. *Cf. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, ___ U.S.___, 112 S. Ct. 501, 508 (1991) ("The First Amendment presumptively places this sort of discrimination beyond the power of the Government.")

Therefore, this Court must now answer these questions. In this area fraught with the heightened sensitivity of political, ideological, and noncollective bargaining speech, may the silence of a nonmember of a private labor organization be treated the same as the silence of a union member, who has affirmatively joined and associated himself with the goals and activities of the union? Moreover, what interpretation of the silence of nonmembers towards the impending seizure and use of their monies for political and ideological purposes is consistent with the government's requirement to "tread with sensitivity in areas freighted with First Amendment concerns," *Hudson*, 475 U.S. at 303 n.12, and "[non]favoritism [ ] towards the underlying message expressed" *R.A.V. v. City of St. Paul*, ___ U.S. ___, 60 U.S.L.W. 4667, 4670 (U.S. June 22, 1992) (No. 90-7675). In this delicate First Amendment context, who must bear the burden to show whether the silent nonmember supports the union's political and ideological speech — the individual objector who has never spoken and remains silent, or the solicitor of this type of funds? Thus, should the union bear the burden of showing that a nonmember has affirmatively agreed to fund the union's political and ideological activities, as the district court required? Or, as the court of appeals allowed, may the government require the nonmember to affirmatively come forward and show that he or she objects to funding those activities, even though he or she has never agreed to contribute to the union's political and ideological activities?

II. THE PANEL'S DECISION ALLOWING A UNION AND A PUBLIC EMPLOYER TO SEIZE POLITICAL AND IDEOLOGICAL FEES FROM NONMEMBERS IN EXCESS OF THE *PRO RATA* COST OF COLLECTIVE BARGAINING, WITHOUT THEIR AFFIRMATIVE CONSENT, CONFLICTS WITH THE DECISIONS OF THIS COURT

A. The Conflict With This Court's Decisions Requiring the "Least Restrictive Means" Be Used When a Compelling State Interest Justifies an Infringement on First Amendment Rights

The court of appeals mistakenly held that the LAUSD and the UTLA may seize full dues, including those dues concededly expended for political, ideological, and other nonbargaining activities from silent nonmembers, because the panel believed that "a long line of Supreme Court cases beginning with [*Street*]," supports the union's contention that "nonunion employees need be given only an opportunity to 'opt out' of full dues payment." App. A at 4a (*Mitchell*, 963 F.2d at 260). That holding misapplies the *Street* admonition that "dissent is not presumed — it must affirmatively be made known to the union by the dissenting employee," *id.*, 367 U.S. at 774, which was applied in an entirely different context than that presented in this case. Moreover, applying *Street*'s admonition to nonmembers conflicts with this Court's decisions regarding the standards to be applied to infringements on the First Amendment rights of freedom of association, petition and speech.

Street involved a class action where the Georgia court had certified the plaintiffs — *who were all formal members of the union* — as representatives of "plaintiffs, intervening plaintiffs, and [those employees] who have been and are *opposed* to the use of their money by the labor union defendants." *Machinists v. Street*, 215 Ga. 7, 108 S.E.2d 796, 801 (1959) (emphasis added). The Georgia court also entered an injunction preventing the unions and employers "from enforcing * * * the union shop agreements * * * and from discharging petitioners, or any

member of the class they represent, for refusing to become or remain members of, or pay periodic dues, fees, or assessments," unless the union withdrew from political and ideological activities. *Street*, 108 S.E.2d, at 803.

This Court reversed, since the injunction made no distinction between voluntary and compelled members of the union. Moreover, as this Court later explained, that broad injunction violated the First Amendment rights of "*union members* who do wish part of their dues to be used for political purposes * * * 'without being silenced by the dissenters,' [*Street*, 367 U.S.] at 772-773." *Abood*, 431 U.S. at 238 (emphasis added) (other citations and footnote omitted).[10] In short, the class of *union members* in *Street* is clearly distinguishable from the class of *nonmember* teachers in this case.[11]

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[10] In other decisions of this Court, the *Street* "dissent is not presumed" admonition appears as *dicta*. *See Railway Clerks v. Allen*, 373 U.S. 113, 118-19 (1963). Nevertheless, the court of appeals, citing this Court's decision in *Lehnert*, 111 S. Ct. at 1959-60, stated that "the premise remained that employees had the burden of objecting." App. A at 6a (*Mitchell*, 963 F.2d at 261). *However, the narrow issue presented in this case simply was not presented in Lehnert*, which involved whether certain specific union activities were chargeable to nonmembers as part of the costs of collective bargaining. Furthermore, the nonmembers in *Lehnert* did not challenge the requirement that they object to the payment of full union dues. *Lehnert*, 111 S. Ct. at 1954-55, 1958-60.

[11] The panel dismisses this distinction because although the objecting employees in *Abood*, 431 U.S. at 212 n.2, consisted of both union and nonunion employees, this Court "held that all plaintiffs * * * were required to voice their objection to payment of the full agency fee." App. A at 7a-8a (*Mitchell*, 963 F.2d at 262). Unlike here, the nonmembers in *Abood*, like the nonmembers in *Lehnert*, *Beck* and *Hudson*, did not challenge the union's requirement that they had to object to the payment of full union dues. Nor was the petitioners in *Abood* exclusively made up of nonmembers of the union. Accordingly, *Abood* did not decide this question. Neither did it diminish the critical distinction discussed *supra* at 11, between the silence of union members and the silence of nonmembers to the seizure and use of their funds for political, ideological and other nonbargaining purposes.

This distinction becomes even more important since this Court recognized that the agency shop itself is "a significant impingement on First Amendment rights," *Ellis*, 466 U.S. at 455; *see also Hudson*, 475 U.S. at 301 n.8 (*citing Ellis*). Nonetheless, that impingement may be justified by the State's compelling interest in collective bargaining and "labor peace." *Abood*, 431 U.S. at 224; *see generally Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986) (when statutory provision burdens First Amendment rights, it must be justified by a compelling state interest). This compelling state interest validates the public sector agency shop, but only "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment." *Abood*, 431 U.S. at 225-26. *It does not validate the agency shop for political, ideological and other nonbargaining purposes! Id.*

The panel's authorization of the agency shop for political and ideological purposes is contrary to all principles of our constitutional government and cannot survive the exacting standards of the "least restrictive means" test. *See Attorney General v. Soto-Lopez*, 476 U.S. 898, 909-10 (1986); *see also Elrod*, 427 U.S. at 362; *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958). Furthermore, since the compelling state interest of insuring "the Union's ability to require every employee to contribute to the cost of collective-bargaining activities," *Abood*, 431 U.S. at 237, has been completely served when, like the district court's injunction, nonmembers are subject only to the seizure of the reduced collective bargaining fee, there is no

compelling state interest[12] to support the panel's lifting of the injunction.

The court of appeals also suggested that the closest analogy to this case "may be the 'opt out' procedure utilized in class action lawsuits. See Fed. R. Civ. P. 23(c)(2)." App. A at 8a (*Mitchell* 963 F.2d at 262). However, the court then misapplied the "opt out" procedure to opting out of paying full dues, instead of opting out of paying only reduced fees. Since there is no compelling state interest in requiring payment of full dues, there is no basis for selecting the payment of full dues from which one can "opt out." Rather, as the district court correctly determined, the compelling state interest in paying only the reduced fee focuses the "opt out" on the reduced fee, not full dues.

Revealingly, the court of appeals admitted that it also reversed the district court because "the burdensome 'opt in' requirement sought by the class in this case would unduly impede the union." *Id.* at 9a (*Mitchell*, 963 F.2d at 262-63). Although the court of appeals does not finish the statement, it is obvious that the court was impermissibly concerned about "imped[ing] the union" *in its political and ideological activities*, which are, of course, not protected by the compelling state interest justifying the agency shop.[13] In fact, "the constitutional right of free

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[12] Although elected public officials, as the potential beneficiaries of union largesse expended for political and ideological activities, obviously have an interest in filling labor organization coffers with monies which they might themselves receive (the labor organization's interest is self-evident), this Court long ago recognized that "care must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod*, 427 U.S. at 362; *see also R.A.V. v. City of St. Paul*, 60 U.S.L.W. at 4670.

[13] Since the district court's injunction allowed the government and union to collect the reduced fee that the union claimed was used for collective bargaining purposes, but not the amount the union conceded was used for political and ideological purposes, the injunction could not impede the union in its only activities, collective bargaining, for which the union may compel support to serve the compelling state interest in labor peace.

expression is * * * intended to remove governmental restraints from the arena of public discussion, *putting the decision as to what views shall be voiced largely into the hands of each of us* * * *." *Cohen v. California*, 403 U.S. 15, 24 (1971) (emphasis added); *See also R.A.V. v. City of St. Paul*, 60 U.S.L.W. at 4671.

Nevertheless, the panel allows government to divine consent to political speech from mere silence. Then it authorizes government not only to appoint a private organization as the political agent of silent nonmembers, but it allows the government to impose an enforceable political and ideological financial obligation based on nothing more than the individual's passivity. It allows the government to decide whose views shall be voiced by presuming consent from silence.

More important, the collection/"opt-out" system approved by the panel is the same as the "reverse checkoff" system condemned by the Federal Election Campaign Act of 1971, §321(b)(3)(A), as amended, 2 U.S.C. § 441b(b)(3)(A), because it does not produce a knowing and voluntary political contribution. *Federal Election Comm'n v. National Educ. Ass'n*, 457 F. Supp. 1102 (D.D.C. 1978). Like the Act, the First Amendment, also, must prohibit any collection system that does not ensure that all contributions to such highly sensitive and divisive causes are truly voluntary. Accordingly, the facts and reasoning of *Federal Election Commission v. National Education Association* are most relevant and persuasive herein.

Distinguishing the "dissent" language in *Abood*, 431 U.S. at 238, and *Street*, 361 U.S. at 774, the court in *Federal Election Commission v. National Education Association*, 457 F. Supp. at 1106-07, declared:

> [C]oincidence of viewpoints between a member and a labor organization's employment objectives does not necessarily translate into coincidence of political viewpoints. Secondly, when a member joins, he likely assumes that he will have to pay his fair share of the cost of the union's normal labor activities. It does not

> follow that he knows he will also be supporting the union's extracurricular activities in the political arena unless he expressly objects.

Id. at 1108.[14]

Further, the district court, *id.* at 1107-10, recognized the blatantly self-serving and coercive nature of a system where the individual is required to act to prevent seizures for political and ideological activities. *Cf. Galda v. Bloustein (Galda I)*, 686 F.2d 159 169 n.17 (3d Cir. 1982). For example, prior to the institution of the reverse checkoff system, the union only collected 25% of the amount that was collected after the institution of automatic checkoff of political funds. The court therefore concluded that automatic collection of political and ideological contributions, without affirmative consent, inherently "results in some unknowing, and therefore, involuntary, contributions." *Federal Election Comm'n v. National Educ. Ass'n*, 457 F. Supp. at 1107.

The court based its conclusion, in part, on the admission at oral argument of counsel for the UTLA's national affiliate, the NEA:

> "[I]t is well recognized that if you take away the mechanism of payroll deduction you won't collect a penny from [our members], and it has nothing to do with voluntary or involuntary. I think it has to do with the nature of the beast, and the beasts who are our

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[14] It is essential to recognize that *Federal Election Commission v. National Educ. Ass'n*, 457 F. Supp. at 1103, involved union *members*. The obvious implication is that, even among voluntary union members, the placement of an obstacle can provide a significant impingement on the exercise of members' rights, notwithstanding the fact that they, at least, have given authority to the union to speak on their behalf. Even more compelling is the instant case, which questions whether such an impingement is warranted with regard to *nonmembers*, who have given *no authority* to the union to speak on their behalf on *any* issue.

> teachers * * * *who simply don't come up with money regardless of the purpose.*"

Id. at 1109 (emphasis added).

The court also refuted the claim of the UTLA and the panel[15] that the seizure of monies from silent nonmembers constitutes their voluntarily act.

> Through reverse check-off, [the union] lower[s] the curtain back around its members to cause that indifference to insulate the union from requested [political] refunds. The Supreme Court said in *Pipefitters* that the essence of whether a contribution is actually or effectively [voluntary] "is whether the method of solicitation for the fund was calculated to result in knowing free-choice donations." In this Court's view, "knowing free-choice" means an act intentionally taken and not the result of inaction when confronted with an obstacle. * * * [T]o ensur[e] that every dollar in that political action fund is knowingly and intentionally given[,] * * * *the burden must be on the solicitor and not the dissenter.*

Id., (emphasis added) *citing Pipefitters Local 562 v. United States*, 407 U.S. 385, 439 (1972).

Like the district court's injunction herein, *see* App. C. at 22a n.7, 26a & n.11 (*Mitchell*, 744 F. Supp. at 943 n.7, 944 & n.11),

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[15] Similarly, the district court herein made the following factual and legal findings:

> [N]on-union employees, merely because they did not file an objection, cannot be deemed to have intentionally abandoned a known right or to have consented to an abridgement of their First Amendment interests. In sum, non-union members cannot be deemed by silence to have consented to a deduction from their paychecks greater than the compulsory agency fee.

App. C. at 21a (*Mitchell*, 744 F. Supp. at 942).

the court in *Federal Election Commission* struck a balance, preventing the compelled support of union political and ideological activities, while not infringing upon the union's own First Amendment right to engage in political and ideological advocacy.

> This Court's decision does not preclude the [unions] from using the payroll deduction method for funding its political action committee. It simply requires that the union member be asked beforehand if he wants a [political] contribution to be deducted along with his dues.

Federal Election Comm'n v. National Educ. Ass'n, 457 F. Supp. at 1109.

However, the reverse checkoff procedure approved by the panel impermissibly insures "that inertia will . . . persuade a dissenter to relinquish his constitutionally protected right to freedom of association." The Supreme Court, 1976 Term, 91 Harv.L.Rev. 1, 198 (1977).

B. The Conflict With This Court's Decision in *Hudson*

As previously noted, the court of appeals relied on the fact that "a long line of Supreme Court cases" supported the union's position that it could presume the consent of nonmembers to full dues seizures. Conspicuously, the panel completely ignored the district court's close and correct reading that the "oft-repeated language" appears in a *different* context when it is quoted in *Hudson*, 475 U.S. at 306, the first agency shop case dealing exclusively with nonmembers, than its original union member context in *Street*. Thus, the different context of *Hudson* totally recasts the meaning of the "oft-repeated language."

This Court in *Hudson* established the specific "constitutional requirements for the Union's collection of agency fees." 475 U.S.

at 310. In discussing the burden of "objecting," this Court spoke, not in the context of nonmembers' objecting in order to receive an "advance reduction" of the political and ideological monies, 475 U.S. at 304-06, but rather, in the context of objecting in order to invoke the "impartial decisionmaker" process required by the Court:

> [T]he nonunion employee has the burden of raising an objection, * * * the union retains the burden of proof: "'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.'" *Abood*, 431 U.S., at 239-240, n.40, *quoting Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963).

Id. at 306 (other citations and footnote omitted).

This Court's juxtaposition of the requirement of "objection" against the union's retention of the burden of proof further indicates that the "objection" required was not an objection to avoid paying for full union dues and the union's political, ideological, and nonbargaining agenda. Rather, reference to a "burden of proof" is, and can only be, relevant to an adversarial proceeding, *viz*, the required "impartial decisionmaker" process which the nonmember may invoke by objecting to the union's calculation of the reduced fee. *Hudson*, 475 U.S. at 306.

Furthermore, when this Court spoke of the purposes for an "objection" in *Hudson*, it spoke only to the invocation of the impartial decisionmaker process, not the payment of a reduced fee.

> The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of *objecting*, is entitled to have his *objections* addressed in an expeditious, fair, and objective manner.

475 U.S. at 307 (footnote omitted; emphasis added).

Unlike the court of appeals, the district court, also, recognized this important and critical distinction:

> Although courts have deemed a non-union member's failure to make his objection known to be a waiver, the waiver extends only to the *right to contest* the agency fee assessment, a sum that is almost invariably less than full union dues.

App. C at 22a (emphasis added) (*Mitchell*, 744 F. Supp. at 942).

Since the "dissent is not presumed" language is quoted in the context of the nonmember's invocation of the procedure to challenge the amount of the fee, this Court simply meant that nonmember challenges to the union's calculation of the reduced fee will not automatically be presumed. However, since all that nonmembers are required to pay is the reduced fee devoid of the political, ideological and other nonbargaining costs, consent to payment of full dues will not be presumed.

C. The Conflict With This Court's Decisions Concerning the Waiver of Fundamental Constitutional Rights

The panel's holding that a public employer and a union may presume that a nonmember waives by silence his right to pay less than full union dues also conflicts with this Court's jurisprudence regarding waiver of constitutional rights.

The court of appeals suggested that a lower standard than this Court uses in deciding waiver of fundamental constitutional rights in criminal cases should apply in the civil context. App. A. at 8a (*Mitchell*, 963 F.2d at 262). Asserting that "[t]he case before us * * * reveals none of the coercive elements so palpable in a police confrontation," the court of appeals held that "[t]here is thus no basis, either factual or legal, for the district court's

conclusion that plaintiffs were 'compelled' to acquiesce, in violation of their First Amendment rights." *Id.*[16] A review of the consistent constitutional standard used by this Court demonstrates the error of the panel's misapplication of the waiver standard.

The district court correctly applied this Court's prior decisions regarding the waiver of constitutional rights in the criminal context to this case, noting:

> The Supreme Court has held that "a 'consent' or 'waiver' of a person's rights" requires a showing of "an intentional relinquishment or abandonment of a known right or privilege." *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (in the context of Fourth Amendment rights). As a general prophylactic measure, courts indulge in "every reasonable presumption against waiver" and "do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458 (1938).

App. C at 21a.

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[16] The court of appeals misstates the conclusion of the district court which did not find that any nonmembers "were 'compelled' to acquiesce." The district court's finding was that "non-union members cannot be deemed by silence to have *consented* to a deduction from their paychecks greater than the compulsory agency fee." App. C. at 21a (emphasis added) (*Michell*, 744 F. Supp. at 942. The court of appeals confuses "acquiescence," a passive acceptance, with consent, an active agreement. Only the active "consent" is applicable to a situation where the question is an individual's *support* of political and ideological speech.

The court of appeal's legal conclusion is also contrary to the record, since in March 1990, the LAUSD seized fees equal to full union dues from *all* nonmembers, without regard to whether any individual nonmember had objected. R.4, *Declaration of Wayne Johnson*, at ¶ 10. Under similar circumstances, the Third Circuit found that the start of fee seizures discourages objections. *Galda I*, 686 F.2d at 168 n.16.

Without specifically ruling upon the issue, this Court has suggested that the principles guiding its decisions regarding waiver of fundamental constitutional rights in the criminal context are equally applicable in the civil contest. *See D.H. Overmyer, Inc. of Ohio v. Frick Co.*, 405 U.S. 174, 186 (1972) (applying criminal standard of waiver and finding standard met in the civil case); *see also, id.* at 188-89 (Douglas, J., and Marshall, J., concurring) (stating that criminal standard "applies even in civil matters"); *citing Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 307 (1937) (unanimously holding that "We do not presume acquiescence in the loss of fundamental rights in a civil case").

This Court's jurisprudence regarding waiver of fundamental constitutional rights requires a two-pronged test. A waiver may be found only when (1) the failure to assert a known right is coupled with (2) a course of conduct consistent with waiver. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). In the instant case, because the fees are automatically seized by the government,[17] a waiver can never be found without the written consent because the second prong of the waiver analysis — *conduct* — cannot be satisfied.

As this Court stated:

> [*M*]*ere silence is not enough*. That does not mean that a defendant's silence, coupled with an understanding of his rights, and a course of conduct indicating waiver, may never support a conclusion that a defendant has

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[17] A contrary conclusion might be required if fees were not, as here, automatically seized from the pay of nonmembers without their consent. Under the circumstances where nonmembers are required to pay fees directly to the union, and if a constitutionally adequate notice were provided to the nonmember, a waiver could be found for the nonmembers who voluntarily paid an amount equal to full union dues, or authorized the deduction of full union dues from their paychecks, because that case would present "a course of conduct indicating waiver." *Butler*, 441 U.S. at 373.

> waived his rights. The court must *presume* that a defendant *did not waive* his rights; *the prosecution's burden is great*; but in at least some cases waiver can be clearly inferred from the actions *and* words of the person interrogated.

Butler, 441 U.S. at 373 (emphasis added).

In direct disregard of these requirements, the court of appeals not only presumes that silent nonmembers have waived their right to pay only for the costs of collective bargaining, but by this same silence, presumes nonmembers have authorized the union to speak on their behalf regarding political and ideological activities. Instead of treading with sensitivity to protect our precious First Amendment rights of speech and association, the panel has stomped them to death.

CONCLUSION

In a free society, government-sanctioned restrictions on freedom of association, petition and speech must be narrowly drawn to minimize the infringement on individual rights. The district court properly recognized that a public employer's automatic seizure for and on behalf of a private labor organization of an amount exceeding the nonmember's *pro rata* share of the cost of collective bargaining "casts the union in the role of a 'free rider' at the expense of non-union employees." App. C. at 22a-23a (*Mitchell*, 744 F. Supp. at 943).

The panel's expansive construction of the scope of assistance the government may give unions in the procedures used to automatically seize nonmembers' monies for the political, ideological and nonbargaining activities of unions repudiates that fundamental tenet of First Amendment law and confers a government-mandated, government-enforced special privilege upon the favored union speakers in expressing their views on political and ideological subjects in violation of *R.A.V. v. City of St. Paul*, 60 U.S.L.W. at 4671. Moreover, it places in the hands

of the government, rather than the individual, "the decision as to what views shall be voiced." *Cohen*, 403 U.S. at 24.

An erroneous precedent, thus, has been set: a) placing the burden on the nonmember to object to, rather than the union to solicit, funding for the union's political and ideological agenda; b) misapplying the applicable decisions of this Court; and c) exacerbating the confusion of the court of appeals on this question which affects the 2.2 million nonmember employees represented by unions.

For these reasons and the reasons set forth above, the Court should issue a writ of certiorari to the Ninth Circuit and set the case for plenary briefing and argument on this important question presented, which the Court has not explicitly resolved.

Respectfully submitted,

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July 1992

APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

April 29, 1992

[963 F.2d 258]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBIN GANSLEY MITCHELL; ARTHUR L. BENVENISTE; WALTER J. BORDEN; CONRAD J. CHAVEZ, et al.,	)	No. 90-56180
	)	D.C. No. CV-90-1427-RB
Plaintiffs-Appellees,	)	
	)	OPINION
v.	)	
LOS ANGELES UNIFIED SCHOOL DISTRICT,	)	
Defendant	)	
and	)	
UNITED TEACHERS - LOS ANGELES,	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
for the Central District of California
Robert C. Bonner, District Judge, Presiding
Argued and Submitted October 9, 1991
Pasadena, California
Filed: April 29, 1992

[259]Before: SCHROEDER, LEAVY, and FERNANDEZ, Circuit Judges.

SCHROEDER, Circuit Judge:

The plaintiffs-appellees in this case are employees of the defendant Los Angeles Unified School District. They are represented by the defendant and appellant union, United Teacher – Los Angeles. That union represents approximately 35,000 teachers in the Los Angeles School District under an agency shop agreement duly certified pursuant to the California Educational Employment Relations Act, Cal. Gov't Code 3540-3549.3 (West 1980 & Supp. 1992). The agreement contains an agency fee provision which authorizes a payroll deduction on behalf of the union for all employees, regardless of union membership or nonmembership, in an amount not to exceed normal union membership dues and assessments. It is that agency fee provision which is at issue in this appeal.

The named plaintiffs in this case are nonunion members of the bargaining unit. They filed this action against the school district and the union challenging various aspects of the operation of the agency fee provision. The district court's opinions in the case are reported at 739 F. Supp. 511 (C.D. Cal. 1990) ("*Mitchell I*") and 744 F. Supp. 938 (C.D. Cal. 1990) ("*Mitchell II*", the subject of this appeal). On appeal, the facts are not disputed. The issue is the legal sufficiency under the First Amendment of the procedures followed by the union to prevent plaintiffs as nonunion members from being forced to pay for the union's political activities which plaintiffs do not support.

These are the procedures that were followed. In November of 1989, a greater than two-to-one majority of the affected employees voted in favor of a mandatory agency fee arrangement. The election was conducted and the results were certified by the California Public Employment Relations Board. The union then sent a notice to all nonmembers in the bargaining unit. That notice advised the nonmembers of their obligation to pay an agency fee equal to the full amount of union dues unless the

nonmember informed the union in writing within 30 days that the nonmember objected to paying for non-representational union activities. The notice further informed the nonmembers that the cost of the union's representational activities accounted for 84.6 percent of the full agency fee and that those nonmembers objecting to the full agency fee would be obligated to pay only a reduced agency fee based solely on the cost of the union's representational activities. Approximately a week after the first notice, the union sent all nonmembers a second notice containing the same information. A majority of the nonmembers, including the named plaintiffs, did not respond to either notice.

After the payroll deductions began, the named plaintiffs filed this action seeking to represent a class of all nonunion employees in the bargaining unit. They contended that to ensure adequate protection of their First Amendment rights, the union could lawfully deduct the full amount of dues from their paychecks only if they affirmatively consented to contribute to the activities of the union not related to representation. The district court agreed, certified the class, and entered an injunction enjoining the union from collecting any more than the reduced agency fee from nonunion employees "unless the employee affirmatively consents to deduction of full union dues." *Mitchell II*, 744 F. Supp. at 945. The union timely appealed. This court ordered [260]the school district's appeal dismissed because it was untimely.

In its appeal, the union readily acknowledges that when a union collects fees under a union or agency shop agreement authorized by state law, there may be employees who object to the union's political activities. The Supreme Court has held that under the First Amendment, employees must be given an opportunity to make such objections known and the fees these dissenting employees pay must be reduced by the amount the union spends on activities not necessary to its role as collective bargaining representative. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 240 (1977). The union contends that the district court erred, however, in holding that the First Amendment requires more than an opportunity to object but additionally requires

affirmative consent to the payment of full union dues before the full dues may be deducted. In other words, the union contends that dissenting nonunion employees need be given only an opportunity to "opt out" of full dues payment. It argues that the Constitution does not mandate a system under which non-members pay full union dues only if they "opt in."

The union's position is supported by a long line of Supreme Court cases beginning with *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). The issue in *Street* was whether a union "receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes." 367 U.S. at 749. The Court concluded that it should not. Avoiding constitutional issues, the Court construed the provisions of the Railway Labor Act to prevent a union "over an employee's objection" from using compulsory union dues to support political causes the employee does not favor. *Id.* at 770. Dealing with whether the employee has any obligation to make an objection known, the Court said in oft-repeated language that "dissent is not presumed — it must affirmatively be made known to the union by the dissenting employee." *Id.* at 774. "The union receiving money exacted from an employee under a union shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities." *Id.*

Following the precedent set in *Street*, the Supreme Court in *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 118-19 (1963), reaffirmed the requirement that, under the RLA, an employee who objects to the union's use of his deducted funds for activities unrelated to a union's representational role must make that objection known to the union. In addition, the Court stated that "[n]o respondent who does not in the course of the further proceedings in this case prove that he objects to such use [of agency fees by the union for nonrepresentational purposes] will be entitled to relief. This is not and cannot be a class action." *Id.* at 119. The meaning of this statement is clear: under the statutory scheme created by the RLA, employees who fail to object individually to the amount of the compulsory union

dues have no right to receive relief from the payment of those dues. Accord *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970) (on remand in action against union under the RLA, district court should include as plaintiffs only those employees who raised an objection to the use of agency fees for political purposes).

In *Abood*, the Supreme Court considered the contention that a union shop arrangement affecting public employees violated the constitutional rights of those employees who objected to "public-sector unions as such or to various union activities financed by the compulsory service fees." 431 U.S. at 211. The Court had to rule first on the constitutional validity of compelling employees to support a particular collective bargaining representative. Citing *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956) and *Street*, the Court ruled that such a requirement "is constitutionally justified by the legislative assessment of the important contribution of the union **[261]**shop to the system of labor relations established by Congress," *id.* at 222, and concluded that the same justifications presumptively supported the establishment of the Michigan agency shop law. *Id.* at 225. The Court then had to determine whether the state could constitutionally permit "the use of nonunion members' fees for purposes other than collective bargaining." *Id.* at 232. The Court ruled that the union could use the funds for such purposes provided that the money came from employees who did not object to the expenditures. Thus the Court held that the Constitution required the same right to object to political expenditures previously articulated in the context of the Railway Labor Act in *Street* and *Allen*. The Court rejected the notion, advanced by the plaintiffs in this case, that the only funds from nonunion members that the union could constitutionally use for political or ideological causes were funds that the nonunion members volunteered to pay. "[T]he Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who were not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-36.

In *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, 466 U.S. 435 (1984), and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Supreme Court addressed the procedures that a union should follow in order to safeguard the First Amendment rights of dissenting nonunion employees. The Supreme Court's premise continued to be that the state could constitutionally authorize the union to collect full dues provided those who objected to political or ideological expenditures would be permitted to pay an appropriately reduced share of the agency fee. The objective under the First Amendment was to "prevent[ ] compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237).[1]

The most recent Supreme Court decision in the area of agency fees is *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950 (1991), another case arising under Michigan's agency shop statute, and dealing with the nature of activities that could or could not be supported through the funds of objecting employees. Again, the premise remained that employees had the burden of objecting. See *id.* at 1959-60.

There is, accordingly, no support for the plaintiffs' position in this case that affirmative consent to deduction of full fees is required in order to protect their First Amendment rights. The Supreme Court has repeatedly held that nonunion members' rights are adequately protected when they are given the opportunity to object to such deductions and to pay a fair share fee to support the union's representation costs. Indeed, this court has expressly articulated the plaintiffs' burden in *Grunwald v. San Bernardino City Unified Sch. Dist.*, 917 F.2d 1223 (9th Cir. 1990). In determining the adequacy of nonunion employees' notice to the union of their objection to the full fee, we said: "The

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[1]Plaintiffs in this case and in the district court objected to a number of features of the union's collection procedures under *Hudson*, but on appeal, neither party has asked us to decide any of these issues arising under *Hudson*.

Supreme Court has clearly held that the nonunion employee has the burden of raising an objection. 'The nonmember's 'burden' is simply the obligation to make his objection known.'" *Id.* at 1229 (citation omitted) (quoting *Hudson*, 475 U.S. at 306 n.16).

The California Supreme Court reached the same conclusion in a case which decided an issue similar to that raised here but arising directly under the California Educational Employment Relations Act (EERA). *Cumero v. Public Employment Relations Bd.*, 49 Cal. 3d 575, 581, 262 Cal. Rptr. [262]46, 48, 778 P.2d 174, 176 (1989). In *Cumero*, the California Supreme Court ruled that:

> The only limit expressly imposed by the EERA on the amount of the nonmember fee the union may collect is that the fee may not exceed the union's standard initiation fee, periodic dues, and general assessments. (3540.1, subd. (i)(2).) That limitation implies a general prohibition against putting the service fees to any use to which the union could not properly put the funds voluntarily paid by its members.
>
> In addition to rights stemming from that general constraint, each nonmember has a right to prevent the use of his or her service fee for purposes beyond the union's representational obligations. Since . . . that additional right is an aspect of the right of an employee to refuse to participate in a union's activities (3543), it must be affirmatively asserted or else it is waived.

Id. at 590, 262 Cal. Rptr. at 54-55, 778 P.2d at 182-83 (emphasis in original).

Plaintiffs have endeavored to distinguish their case from the United States Supreme Court decisions, particularly from *Abood*, which most closely addresses their situation and most clearly rejects their position. Plaintiffs point out that their case is the first to involve a class consisting entirely of nonmembers. They contend that this characteristic of the class requires us to conclude that these plaintiffs must be assumed to disagree with

the union's political activities. It is true that the class in *Abood* consisted of both union and nonunion employees. The Court, however, was dealing with an issue of individual constitutional rights and held that all plaintiffs, not just those who were union members, were required to voice their objection to payment of the full agency fee.

The district court in granting the plaintiffs relief analogized to the waiver of constitutional rights in the criminal context to conclude that the plaintiffs had not expressly waived their right to object and were thus effectively "compelled" to pay more than their fair share. *Mitchell II*, 744 F. Supp. at 941-42. In the context of a police confrontation, the Supreme Court has stated that there must be "an intentional relinquishment or abandonment of a known right or privilege" for there to be a valid consent to search under the Fourth Amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 235 (1973). See also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (cautioning courts not to "presume acquiescence in the loss of fundamental rights" in connection with the waiver of right to counsel). The case before us, however, reveals none of the coercive elements so palpable in a police confrontation. The Supreme Court has never suggested that employees who are offered the opportunity to object to the union fee deduction and do not do so act under any compulsion. There is thus no basis, either factual or legal, for the district court's conclusion that plaintiffs were "compelled" to acquiesce, in violation of their First Amendment rights.

The closest civil analogy to this case may be the "opt out" procedure utilized in class action lawsuits. See Fed. R. Civ. P. 23(c)(2). This rule provides that each class member is bound by the result of the litigation unless the member individually objects to being in the class. Ironically, it is this very device that plaintiffs utilize to represent the class of all nonunion members in whose name they advance the principal contentions in this appeal. In its most recent discussion of class action "opt out" procedures, the Supreme Court considered whether protections beyond the opportunity to opt out were constitutionally required to safeguard the rights of a class plaintiff who was out-of-state.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). The Court concluded that the Constitution does not require more than an opt out procedure to protect the "somewhat rare species of class member" who is unwilling to execute and return an opt out form but who does have something amounting to a protectable interest in not being a member of the class. 472 U.S. at 813. By the same token, the burdensome "opt in" requirement **[263]**sought by the class in this case would unduly impede the union in order to protect "the relatively rare species" of employee who is unwilling to respond to the union's notifications but nevertheless has serious disagreements with the union's support of its political and ideological causes.

The procedures followed by the union to give plaintiffs the opportunity to object to the full agency fee complied with the applicable standard to ensure protection of their First Amendment rights. The district court's injunction mandating affirmative consent to the full deduction is REVERSED.

APPENDIX B

FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

September 7, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ROBIN GANSLEY MITCHELL, *et al.*,	CASE NO. CV 90-1427-RB (Kx)
Plaintiffs,	**[Clerk's stamps omitted in printing-Filed Sept. 7, 1990; Entered Sept. 11, 1990]**
v.	
LOS ANGELES UNIFIED SCHOOL DISTRICT; *et al.*,	**FINAL JUDGMENT GRANTING PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION SUMMARY JUDGMENT AND ENTRY OF PERMANENT INJUNCTION**
Defendants.	

For the reasons given in the Memoranda of May 31, 1990 and August 7, 1990, and pursuant to Fed. R. Civ. P. 23, 56, 57 & 58, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that:

1. This action shall be maintained by the plaintiffs as a class action under Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2), on behalf of a class comprised of the nineteen named plaintiffs and all other non-union employees of defendant Los Angeles Unified School District ("LAUSD") as of February 7, 1990, who are within the collective bargaining unit represented by defendant United Teachers – Los Angeles ("UTLA" or "union"), excepting those non-union employees who voluntarily elected to become members of the union after that date.

2. The motion of plaintiffs for summary judgment against all defendants is granted except for the denial in ¶ 6 of declaratory judgment on the indemnification issue.

3. The motions of UTLA for summary judgment and to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim are denied.

4. The motion of defendants LAUSD and Robert Booker to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim is denied.

5. Judgment is hereby entered, pursuant to 28 U.S.C. § 2201, declaring that:

a) both the UTLA's original February disclosure and its revised proposed disclosure of financial information fail to comply with the minimum disclosure requirements mandated by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), because the independent audit does not verify the financial information regarding the apportionment of expenditures between chargeable and non-chargeable costs incurred by UTLA;

b) although the SAS 62 audit is not constitutionally required by *Hudson*, a modified SAS 29 audit would probably suffice, provided that the auditor performs specific additional measures to verify, in accordance with generally accepted accounting principles, the union's allocation of expenses;

c) the defendants' seizures from the wages of non-union members of amounts in excess of the 84.6% of union dues the union has computed as the agency fee for the costs of representation collide with fundamental tenets governing waiver of constitutional rights so that non-union members cannot be deemed by silence to have consented to a deduction from their paychecks greater than the compulsory agency fee; and

d) under *Hudson*, defendant LAUSD, as well as the public employees union, has a responsibility to see to it that adequate procedures are provided which minimize the

impingement of the non-members' constitutional rights because the public employer entered into an agreement authorizing the seizure of the monies that gives rise to plaintiffs' claims for deprivation of federally secured constitutional rights and defendants LAUSD and Booker deducted the fees from the non-union employees' paychecks.

6. Plaintiffs' request for declaratory judgment that the indemnification clause in the collective bargaining agreement between the UTLA and the LAUSD is null and void on the ground that it is violative of the non-union members' rights guaranteed under *Hudson* is denied.

7. Final Judgment is hereby entered in favor of the plaintiffs and class members as described in ¶ 1 and against all defendants on the issue of liability pursuant to 42 U.S.C. § 1983.

8. Defendant UTLA shall give revised notice correcting the specific *Hudson* audit deficiencies adjudicated in this lawsuit to all class members by completing a first class mailing on or before September 21, 1990, which notice shall reinstitute the period for timely challenges to the agency fee calculation. In the event UTLA fails to disseminate a revised notice by September 21, 1990, all escrowed funds deducted from the non-union members paychecks shall forthwith be returned to the class members. Pending completion of the revised notice procedure, all funds collected from the class members shall be maintained by the union in a segregated interest-bearing escrow account.

9. Defendants shall make restitution in an amount equal to the non-chargeable portion (15.4% of union dues), with accrued interest, collected from each class member, including those class members who did not affirmatively object to the 100% deduction, unless a class member affirmatively consents in writing to deductions in excess of the union calculated agency fee. The restitution does not have to be made until November 5, 1990, to give the union time, if it desires, to solicit contributions equal to

full union dues and obtain affirmative written consents for deductions in excess of 84.6% of union dues.

10. All defendants are permanently enjoined from collecting more than the agency fee from any non-union member, unless the employee affirmatively consents in writing to deduction of full union dues.

IT IS SO ORDERED.

DATED: SEP 07, 1990

Manuel L. Real
ROBERT C. BONNER
UNITED STATES DISTRICT JUDGE

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

August 6, 1990

[744 F. Supp. 938]
Robin Gansley MITCHELL, et al., Plaintiffs,
v.
LOS ANGELES UNIFIED SCHOOL DISTRICT, et al., Defendants.

No. 90-1427-RB(Kx).

United States District Court, C.D. California.

Aug. 6, 1990.

* * * *

[939]MEMORANDUM OF DECISION AND ORDER GRANTING PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION, SUMMARY JUDGMENT AND ENTRY OF PERMANENT INJUNCTION

BONNER, District Judge.

I. Background

By memorandum of decision and order filed May 31, 1990, this Court held that the accounting information provided by defendant United Teachers–Los Angeles ("UTLA") in its agency fee notice was constitutionally deficient owing to the failure of an independent audit verification of expenditures, as mandated by *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).[1]

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[1]In *Hudson*, the Supreme Court considered the constitutionality of procedures "to draw that necessary line" between contract bargaining and administration costs which are properly charged to nonmembers and sums for the support of ideological causes which are not, and to respond to nonmembers' objections to the manner in which it was drawn.

On July 16, 1990, a hearing was held regarding two motions brought on by plaintiffs: (1) for class certification and (2) for summary judgment against the defendants in the form of injunctive and restitutionary relief. The facts underlying this action are set forth in greater detail in the Court's May 31, 1990 ruling. *See Mitchell v. LAUSD*, 739 F.Supp. 511 (C.D.Cal.1990). Consistent with the reasoning of my earlier decision, and for purposes of resolving the matters under submission, the Court today reaffirms its ruling that the UTLA failed to comply with the disclosure requirements regarding its allocation between chargeable and non–chargeable expenditures.

> ... the Court concludes that the independent verification requirement must apply to the allocation of chargeable and non–chargeable expenditures in a union's major categories. The teachers union's disclosure fails because, with respect to the data most critical to a non–member's decision whether to contest the computation of the agency fee, an auditor-verified breakdown between chargeable and nonchargeable costs is lacking. [adopting the rationale set forth in *Hohe v. Casey*, 727 F.Supp. 163, 167 (M.D.Pa.1989)].

Mitchell, 739 at 512.

Accordingly, the plaintiffs are entitled to judgment on the issue of liability. The remaining issues for adjudication involve class certification and the appropriate relief available to the plaintiffs.

II. Discussion

1. *Class Action Certification.*

Before turning to the nature of relief, the Court decides that this action should be certified as a class action pursuant to Fed.R.Civ.P. 23(a), (b)(1)(A) and (b)(2), because of the large number of non–union employees affected by the substantive disposition of this lawsuit and because the same questions of law and fact are common to all non–union members who received the

UTLA's defective *Hudson* notice in connection with the agency fee deduction from their paychecks.[2]

Plaintiffs have established that the proposed class satisfies the numerosity, commonality, typicality and adequacy of representation requirements of Rule 23(a). The class size, more than 8,000 non–union members who are subject to the defendants' agency fee arrangement, makes joinder of all persons impracticable. In addition, the representative plaintiffs have shown that **[940]**their claims are typical of those of the class because the First Amendment interests of all non–union members were impaired by the defective *Hudson* notice, regardless whether or not they objected to the fee deductions. *See Hohe v. Casey*, 128 F.R.D. 68, 70 (M.D.Pa.1988). Finally, in view of the qualifications and experience of the plaintiffs' attorneys, and because the interests underlying plaintiffs' claims of *Hudson* infringement parallel those of all the other non–union members, the representative plaintiffs can fairly and adequately protect the interests of the class.

Having satisfied the requirements of Rule 23(a), the plaintiffs must meet one of the criteria of Rule 23(b) which provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (1) the prosecution of separate actions by ... individual members of the class would create a risk of

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[2]Agency, or fair share, fees are the fees paid by non–union employees to the union to defray the employees' pro rata share of the costs of the union's activities as the exclusive representative of the employees in dealing with the employer, in this case the LAUSD. *Hudson* instructs that the union may not coerce non–members into supporting political or ideological views with which they may not agree. Consequently, the agency fee cannot include provision for funds spent by the union to support its political or ideological views. *See, e.g., Ping v. National Education Association*, 870 F.2d 1369, 1370 (7th Cir.1989).

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or ...
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole ...

In this case, plaintiffs fulfill both requirements because other non–union members would be entitled to institute similar *Hudson* claims against the defendants, and, furthermore, the injunctive relief ordered today applies to all employees of the Los Angeles Unified School District ("LAUSD") represented by the UTLA collective bargaining unit who are not members of the union. Accordingly, this action shall be maintained as a class action by the plaintiffs on behalf of a class comprised of the nineteen named plaintiffs and all other non–union LAUSD employees represented by the UTLA as of February 7, 1990, excepting those non–union employees who voluntarily elected to become members of the union after that date.[3]

2. *Inadequate Verification of* Hudson *Notice.*

The Court has held that the UTLA's notice mailed to non–union members cannot withstand constitutional scrutiny because the independent audit does not verify the financial information regarding the apportionment of expenditures

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[3]With regard to the 2,295 members who joined the union in response to the notice solicitation, the Court doubts these persons are similarly situated to non–members who have not chosen to join. The plaintiffs' assertion that an employee who became a union member may have been misled in reliance on the audit's failure to verify the breakdown of expenditures is too attenuated to justify inclusion of such employee in the class. There is simply not enough of a nexus between the employee's decision to join the union and the specific *Hudson* deficiency from which to conclude that these recent members may exercise a *Hudson* claim that is typical of those non–members who have refused to belong to the union.

between chargeable and non–chargeable costs incurred by UTLA. The type of audit required, as the Supreme Court has observed, does not require "'absolute precision' in the calculation of the [agency fee] charge to non-members." *Hudson*, 475 U.S. at 307 n. 18, 106 S.Ct. at 1076 n. 18. However, the non-member is entitled, indeed, is guaranteed, the assurance that an independent auditor has verified the union's cost allocation. As this Court explained in its May 31, 1990 opinion:

> The critical data is the ratio between chargeable vs. non-chargeable expenses, because it is this ratio that is used to compute the percentage of union dues properly assessed as an agency fee ... Under *Hudson*, a union must adequately explain the basis for its agency fee computation and, part and parcel of that dictate is that 'adequate' financial disclosure be made to non-union employees reflecting allocations of expenditures be verified by an independent auditor.

Mitchell, 739 F.Supp. at 514-15.

In response to plaintiffs' summary judgment motion, the teachers' union has submitted a revised auditor's letter dated July 3, 1990 of Thomas K. Knox, Certified Pub[941]lic Accountant. The union has not, however, submitted a declaration from the auditor regarding whether he performed any further audit or whether he rectified the original audit's *Hudson* deficiencies. Because remedial action depends, in part, on the adequacy of Mr. Knox's revised letter, the Court believes it appropriate to evaluate the auditor's revised letter.

In his revised letter, Mr. Knox states: "In my opinion, the statement of allocation of expenses between chargeable and nonchargeable presents fairly the expenses of the United Teachers-Los Angeles for the year ended August 31, 1989, [based on definitions given in notes and assumptions describing whether an expense is classified as chargeable or nonchargeable]." It is at best ambiguous whether Mr. Knox purports to verify any information more than the UTLA's expenses in toto, as opposed to verifying the union's apportionment of expenses between

chargeable and non-chargeable categories. Because the Court is "left in the dark" on this critical point, the revised letter fails, once again, to verify the union's allocation of chargeable vs. non-chargeable expenditures, and, consequently, fails to comply with the disclosure requirements of *Hudson*.

Although urged by the plaintiffs, the Court finds it unnecessary and unwise to hold that the SAS 62 audit is constitutionally required by *Hudson* or that the union engage its auditors to perform the "highest" possible level of audit service regarding financial information provided to payors of agency fees. *See Gwirtz v. Ohio Education Association*, 887 F.2d 678, 680-82 (6th Cir.1989) *cert. denied* ___ U.S. ___, 110 S.Ct. 1810, 108 L.Ed.2d 941 (1990). A modified SAS 29 audit would probably suffice, provided that the auditor performs specific additional measures to verify, in accordance with generally accepted accounting principles, the union's allocation of expenses.[4] This further step is essential, because audited financial statements typically do not involve verification for expenditure categories based on the types of activities pertinent to the *Hudson* notice (representational vs. political/ideological).

3. *Seizure of Agency Fees in the Amount of Full Union Dues.*

Under the collection procedure established by the UTLA, the LAUSD, as the teachers' employer, is deducting agency fees equal to 100% union dues from all those 6,000 non-union members who did not file an objection,[5] notwithstanding that

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[4]The auditor's verification of the union's allocation of expenses to chargeable and nonchargeable categories does not turn on a legal determination regarding the appropriateness of the allocation. Rather, the required verification simply warrants an accounting decision that the expenditures which the union claims it made for certain expenses were actually made for those expenses.

[5]The notice informed the employee of the option to (1) either remain a non-member, whereupon it explained the union's legal entitlement to the agency fee, or (2) have his paycheck deducted by the amount of the full UTLA dues:

15.4% of the deduction represents amounts the union itself calculates it spends on ideological activities and despite the fact that the union is not legally entitled to more than it had computed as the agency fee (84.6% of union dues).

The UTLA's seizure of amounts in excess of an agency fee collides with fundamental tenets governing waiver of constitutional rights. In this regard, the very purpose of *Hudson* is to safeguard the First Amendment interests of non-union employees. It is settled that a non-union member can be forced to share in the expenses incurred by a union in its role as the sole bargaining representative of employees within the bargaining unit. The union's representation of non-members is not costless, and all employees can be compelled to contribute their pro rata share of the costs of representation. Yet, non-union members cannot be forced to pay for expenses related to political and ideological activities unrelated to the costs of representation. **[942]***Hudson*, 475 U.S. at 302, 106 S.Ct. at 1073. To compel non-union members to financially support political or ideological causes with which they might not agree would exact an infringement that the First Amendment does not tolerate.

The standards for waiver of a non-union member's First Amendment rights gainsay any seizures in excess of the agency costs related to collective bargaining, contract administration, and grievance adjustment, that is, sums greater than the union is entitled to receive in the form of mandatory, involuntary contributions from non-union members.[6] Indeed, without restricting

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"If you do not desire to pay a fair share fee equal to the full UTLA dues, you must send a letter by certified mail to the UTLA office within 30 days of the mailing date of this notice ... If such a notice is not received by UTLA, then we will presume that you have no objections to being charged the full membership dues."

[6]The problem of UTLA's seizure by presuming consent is analyzed from the perspective of the First Amendment concerns. As the Supreme Court has observed: "[t]he procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Hudson*, 475 U.S. at

the union's ability to exact contributions from non-union members for the pro rata cost of collective bargaining activities, *Hudson* prevents the compulsory subsidization of ideological activity by non-union employees. *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 447, 104 S.Ct. 1883, 1891, 80 L.Ed.2d 428 (1984).

On those occasions where, as here, plaintiffs' interests derive from the Bill of Rights, the Supreme Court has held that "a 'consent' or 'waiver' of a person's rights" requires a showing of "an intentional relinquishment or abandonment of a known right or privilege." *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (in the context of Fourth Amendment rights). As a general prophylactic measure, courts indulge "every reasonable presumption against waiver" and "do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Accordingly, the Court holds that the non-union employees, merely because they did not file an objection, cannot be deemed to have intentionally abandoned a known right or to have consented to an abridgement of their First Amendment interests. In sum, non-union members cannot be deemed by silence to have consented to a deduction from their paychecks greater than the compulsory agency fee.

In addition, the union's reliance on a "waiver by silence" by non-members who did not affirmatively object to having their paychecks docked in an amount greater than the agency fee gives rise to heightened doubts under the facts of this case, because the union withheld from these non-members "sufficient information to gauge the propriety of the agency fee." *See Lowary v. Lexington Board of Education*, 903 F.2d 422, 429 (6th Cir.1990) (the rule that the non-union member's failure to object to the

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n. 13, 106 S.Ct. at 1074 n. 13. Thus, the Court need not evaluate the seizure of non-agency fee amounts under the due process clause, inasmuch as the protection afforded by the First Amendment is coextensive with that afforded by due process.

union's agency fee deduction waives his *Hudson* rights is not applicable because the fee information was insufficient).

Defendants correctly point out that as long as adequate disclosure has been made, courts have allowed unions to collect the agency fee, absent express objection from the non-members. *Mitchell*, 739 F.Supp. at 513 n. 3; *see also Dashiell v. Montgomery County*, 731 F.Supp. 1251 (D.Md.1990). But, defendants also assert that, if the non-member does not affirmatively object, the union is entitled to collect an amount equal to full union dues from the non-member, including the portion of dues representing expenditures for ideological activities. Defendants' assertion misreads precedent on the issue of waiver. Although courts have deemed a non-union member's failure to make his objection known to be a waiver, the waiver extends only to the right to contest the agency fee assessment, a sum that is almost invariably less than the full union dues. The constitutionally limited scope of the waiver by inaction is made clear in *Lowary, supra*, at 430, wherein the Sixth Circuit observed that a dissenting employee "bears the duty of objecting to the *fair share* [agency] fee before relief is granted." [emphasis added].

Hudson devised a procedure that would not interfere with the union's ability to **[943]**require every employee to contribute to the costs of collective-bargaining activities. Nonetheless, failure to affirmatively contest the agency fee cannot be boot-strapped into a presumed waiver of a salary deduction greater than that which the union itself has calculated to be the agency fee.[7] To hold that the union is authorized, absent express consent, to seize an amount to which it concedes it is not entitled

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[7]The union is, of course, free to engage in the solicitation of voluntary contribution from non-members for an amount equivalent to the full union dues. But, to respect plaintiffs' constitutional rights, the union's deduction of the entire amount of dues, an act treating the plaintiffs as if they were union members but without granting them the privileges of membership, must be predicated on a showing of the non-members' affirmative written consent to such collection.

casts the union in the role of a "free rider" at the expense of non-union employees.

Finally, defendant's reliance on *Cumero v. PERB*, 49 Cal.3d 575, 262 Cal.Rptr. 46, 778 P.2d 174 (1989), a recent California Supreme Court decision, does not govern disposition in the case at bar.[8] *Cumero* involved a challenge by a non-union member to the amount of the assessed agency (service) fee based on the plaintiff's claim that the agency fee charge was not properly apportioned, that is, it included an assessment for nonrepresentational activities in violation of his First Amendment rights. Although the opinion suggested, in dicta, that the union may make such assessments unless the non-member affirmatively objects, this Court does not read *Cumero* as broadly as the UTLA urges. *Cumero* does not support the union's contention that it can require a mandatory deduction of an amount equal to 100% of union dues, an amount which concededly exceeds the UTLA's agency fee (*i.e.*, proportionate fee for representational activity) by 15.4%, based on a non-member's failure to object.

By the UTLA's own calculations, any dollar assessment above 84.6% of union dues exceeded the mandatory seizure of an agency fee to which it was entitled. In other words, a deduction in excess of 84.6% of union dues constitutes a voluntary contribution by a non-union member. Nothing, of course, prohibits a non-member from making such a voluntary contribution, but a voluntary contribution cannot be presumed. In the Court's view, before an employee's salary can be diminished on the basis of a voluntary contribution, the employee must, in deference to his First Amendment interests, affirmatively consent to the deduction.

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[8]Although the *Cumero* opinion is instructive, it is well established that federal courts are not bound by decisions of a state supreme court as to the effect of the Federal Constitution. *See State of Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); *Smithfield Concerned Citizens v. Town of Smithfield*, 719 F.Supp. 75, 80 (D.R.I.1989) ("a state court ruling on a federal question is not binding in a federal court").

The Court's rejection of the union's claim that it is entitled to retain an amount equal to 100% of union dues leaves undisturbed the "traditional rule that the proper remedy for an unconstitutional fee collection is not a refund of the total fee, but "the refund ... of a portion of the exacted funds in the same proportion that union [nonchargeable] expenditures bear to total union expenditures." *Lowary*, at 433. Mindful of the objectives announced in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)[9] to protect non-union employees from having to subsidize ideological activity, the Court finds it an appropriate deterrent to award restitution as to only the concededly nonchargeable portion (15.4%) collected from non-union members who did not affirmatively object to the 100% deduction.[10]

[944]4. *Validity of LAUSD Indemnification Clause.*

Finally, the Court denies plaintiffs' request for declaratory judgment that the indemnification clause in the collective bargaining agreement between the UTLA and the LAUSD is null and void on the ground that it is violative of the non-union members' rights guaranteed under *Hudson*. The mere existence of an indemnity clause whereby UTLA agrees to hold harmless LAUSD for adverse actions arising from the union's enforcement

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[9]*Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (the union could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent).

[10]Defendants object to including in the class non-members who have not objected to the fees. However, the gravamen of the complaint contests the absence of procedural safeguards mandated by *Hudson*, rather than the appropriate amount of agency fees actually charged by UTLA, a dispute better resolved in arbitration. Because the failure to disclose an adequate audit verifying the agency fee calculation is an issue common to all non-members of the union, the named plaintiffs have standing to raise this issue on behalf of all members of the plaintiff class, that is, including non-union members who did not object.

of the agency fee arrangement is not facially or, as applied to the facts of this case, unconstitutional. Indeed, many of the post-*Hudson* cases involved indemnity provisions, none of which have been declared invalid. Moreover, the constitutional infirmity that this Court has found—the failure to adequately verify the financial expenditures—is wholly unconnected to the indemnity clause that plaintiffs seek to invalidate.

Plaintiffs rely on *Stamford Board of Education v. Stamford Education Association*, 697 F.2d 70 (2d Cir.1982). In *Stamford*, a "hold harmless" clause in a collective bargaining agreement was found to violate federal civil rights policy on the ground that enforcement of the clause would militate against deterring discrimination. *Stamford* is distinguishable from the LAUSD "hold-harmless" clause. *Stamford* did not hold that indemnity agreements *per se* violate the constitutional rights of non-union members. Plaintiffs' injury arises from a violation of a particular aspect of their *Hudson* rights, specifically the audit's failure to verify the expenditure breakdown. The mere presence of the indemnification clause does not bear on this injury. The constitutional infirmity at issue involves inadequate audit statements, not the agency fee agreement itself. In *Stamford*, by contrast, the court found the collective bargaining agreement on its face discriminated on the basis of sex with respect to the salaries of teachers by providing lower pay for females than males in comparable positions. No such facial defect permeates the LAUSD-UTLA indemnification clause.

III. Conclusion

For the foregoing reasons, IT IS ORDERED that this action shall be maintained by the plaintiffs as a class action under Fed.R.Civ.P. 23(b)(1)(A) and 23(b)(2). The class consists of employees of the LAUSD as of February 7, 1990 who are within the collective bargaining unit represented by UTLA, but who are not currently members of the union.

IT IS FURTHER ORDERED that the UTLA defendants shall give revised notice correcting the specific *Hudson* audit

deficiencies adjudicated in this lawsuit to all members of the plaintiff class by completing a first class mailing within forty-five (45) days from the entry of this Order, which notice shall reinstitute the period for timely challenges to the agency fee calculation. In the event the defendants fail to disseminate a revised notice within forty-five (45) days, all escrowed funds deducted from the non-union members' paychecks shall forthwith be returned to the class members. Pending completion of the revised notice procedure, all funds collected from the members of the class shall be maintained by the union in a segregated interest-bearing escrow account.

IT IS FURTHER ORDERED that defendants make restitution in an amount equal to the non-chargeable portion (15.4% of agency fees), with accrued interest, collected from each class member, including those class members who did not affirmatively object to the 100% deduction. Restitution shall be made within ninety (90) days from the entry of this Order to all non-union members, except those who affirmatively consent to deduction in excess of the union calculated agency fee.[11]

IT IS FURTHER ORDERED that defendants are permanently enjoined from col[945]lecting more than the agency fee from any non-union member, unless the employee affirmatively consents to deduction of full union dues.

Plaintiffs' counsel is directed to lodge within 10 (ten) days of its entry a proposed form of judgment consistent with this Order.

IT IS SO ORDERED.

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[11]The union is given 90 (ninety) days in order to permit it, if it desires, to solicit contributions equal to full union dues and obtain affirmative written consents for deductions in excess of 84.6% of union dues.

Supreme Court, U.S.
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No. 92-169

In The

Supreme Court of the United States

October Term, 1992

ROBIN GANSLEY MITCHELL; ARTHUR J. BENVENISTE; WALTER J. BORDEN; CONRAD J. CHAVEZ; LOUIS SEIVERDING CORTEZ; SCOTT D. EVANS; ELIZABETH S. FORSBERG; HAROLD A. GIANCANELLI; VERA E. LeVEQUE; JOYCE A. MACKIE; BRUCE J. MACKIE; JOYCE McCANN; ANN M. NORTON; JOHN W. NORTON; JANET L. ROTHENBERG; CHERYL SHAPIRO; BETTY ANNE SIKKING; RALPH J. STAM; ALICE C. TURNER, and ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

UNITED TEACHERS-LOS ANGELES,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

STATEMENT OF CASE 1

1. FACTS 2

ARGUMENT 5

I. THE NINTH CIRCUIT DECISION IN THIS CASE PROPERLY FOLLOWED A LONG LINE OF SUPREME COURT PRECEDENT 5

A. This Court has Consistently Limited the Right to Pay a Reduced Agency Fee to those Nonmembers who Affirmatively Object to Paying the Full Fee 5

B. The Agency Fee Cases are Consistent with other Cases Concerning the Obligation to Voice Dissent 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 8, 10, 11

Brotherhood of Ry. and S.S. Clerks v. Allen, 373 U.S. 113 (1963) 7

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986) 4, 8, 10

Cumero v. Public Employment Relations Board, 49 Cal. 3d 575, 262 Cal.Rptr. 46 (1989) 2, 4

Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 466 U.S. 435 (1984) 8

Federal Election Comm'n v. National Education Ass'n, 475 F.Supp. 1102 (D.D.C. 1978) 12

International Association of Machinists v. Street, 367 U.S. 740 (1961) 6, 7, 11

Johnson v. Zerbst, 304 U.S. 458 (1938) 12

Kentucky Educators Public Affairs Counsel v. Kentucky Registry of Election Finance, 677 F.2d 1125 (6th Cir. 1982) 12

Lehnert v. Ferris Faculty Ass'n, ___ U.S. ___, 111 S.Ct. 1950 (1991) 8, 11

McNeil v. Wisconsin, 501 U.S. ___, 115 L.Ed.2d 158 (1991) 13

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) .11, 12

Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970) 7

TABLE OF AUTHORITIES – Continued

Page

Weaver, et al. v. University of Cincinnati, ___ F.2d ___, 1992 U.S. App. Lexis 16717, 140 L.R.R.M. 2948 (6th Cir. July 23, 1992) 9

Wooley v. Maynard, 430 U.S. 705 (1979) 9

STATUTES

California Educational Employment Relations Act 1

Cal. Gov. Code §3540 1

Cal. Gov. Code §3540.1(i)(2) 2

Fed. R. Civ. P. Rule 23 11

Tribe, American Constitutional Law, 2d §45-5 9

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Petitioners,

v.

UNITED TEACHERS-LOS ANGELES,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF CASE

The issue in this case arises from the application of the California Educational Employment Relations Act ("EERA"), Cal. Gov. Code §3540 *et seq.*, which "authorizes a public school district and a labor organization which

constitutes its employees' exclusive bargaining representative to agree upon an organizational security agreement whereby any of the employees who refuse to join the labor organization must pay it a service fee as a condition to continued employment." *Cumero v. Public Employment Relations Board*, 49 Cal.3d 575, 581, 262 Cal.Rptr. 46 (1989). While the EERA explicitly permits the agency fee for nonmembers to be set at an amount equal to one hundred percent of the dues amount the union charges to its members (Cal. Gov. Code §3540.1(i)(2)), the California Supreme Court has interpreted the statute as a whole to allow nonmembers who object to participation in certain union activities to pay a reduced agency fee, in an amount limited to a pro rata share of the cost of a union's activities in representing employees with the school board. *Cumero, supra.* The question which the Ninth Circuit correctly addressed is whether *all* nonmembers must be charged that reduced agency fee, whether they assert such objections or not, or whether those nonmembers who do not affirmatively object to paying the full agency fee after being fully informed by the union of the right to pay a reduced fee, and of the way to assert that right, can be charged the full fee. The Ninth Circuit held, in accordance with a long line of this Court's rulings, that properly informed nonmembers who do not object to paying the full fee can be required to do so.

1. Facts:

In February, 1990, the Union ("UTLA") sent a notice to nonmember bargaining unit employees of the Los Angeles Unified School District, advising them of their obligation to pay an agency fee of $41.00 per month

unless they communicate an objection to paying for non-representational UTLA activities. Those nonmembers who so objected within 30 days of the notice would pay a reduced fee of $34.70 per month, which amounts to 84.6% of the full UTLA membership dues. The notice explained how the reduced fee was calculated based on UTLA's expenditures and those of its state and national affiliates,[1] and enumerated cost items which were included as chargeable to nonmembers, and other items considered nonchargeable.

The Notice was explicit in its distinction between the rights and responsibilities of those who object to paying for nonchargeable activities of the Union and those who are willing to contribute financially to all Union activities by paying an agency fee equal to full UTLA dues, and was explicit as well in specifying the action required to be placed in the appropriate payment category:

> If you do not desire to pay a fair share fee equal to the full UTLA dues, you must send a letter by certified mail to the UTLA office within *30 days* of the mailing date of this notice. Upon receipt of such a letter, you will be required to pay the amount of $347.00 per year with $34.70 deducted monthly. If such a letter is not received by UTLA, then we will presume that you have no objections to being charged the full membership dues. [R:1, Exhibit D(1).]

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[1] UTLA is affiliated with the National Education Association, California Teachers Association, American Federation of Teachers, AFL-CIO and the California Federation of Teachers.

On February 13, 1990, UTLA sent all nonmembers a Supplementary Notice[2] setting forth the chargeable amount schedule, and again advising nonmembers of the consequences of choosing not to object to paying the full agency fee:

> You were notified that unless UTLA receives a notice from you within 30 days of the mailing of the previous notice, that you desire to pay the reduced amount or object to the non-chargeable percentage determinations, the District will deduct the full amount of UTLA dues based on the above schedule. [CR:1, Exhibit E.]

Petitioners in the district court initially conceded the dispositive point that "present law provides that, absent an affirmative objection, the union may collect the full amount of union dues. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 N. 16, *Cumero v. PERB*, 49 Cal.3d 575, 590" (R:14, p. 23). Petitioners nevertheless persuaded the district court to "modify" or "reverse" this precedent, and rule that a full agency fee could never be collected from nonunion members who did not object. *Id.* The court enjoined the union "from collecting any more than the reduced agency fee from nonunion employees 'unless the employee affirmatively consents to deduction of full union dues.' " 9 [Pet.App. 3a] Relying on this Court's cases addressing the question here presented, the Ninth Circuit [Schroeder, J., joined by Leavy and Fernandez, JJ]

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[2] The first notice to nonmembers was sent on or about February 7, 1990, followed up by the February 13, 1990 supplementary notice. In the supplementary notice, the requirement for notice of objection by certified mail was changed to one simply for receipt by UTLA of notice of the objection.

reversed the district court's judgment and held that "the procedures followed by the union to give [petitioners] the opportunity to object to the full agency fee complied with the applicable standard to ensure protection of their First Amendment rights." [Pet.App. 9a]

ARGUMENT

I. THE NINTH CIRCUIT DECISION IN THIS CASE PROPERLY FOLLOWED A LONG LINE OF SUPREME COURT PRECEDENT

A. This Court has Consistently Limited the Right to Pay a Reduced Agency Fee to those Nonmembers who Affirmatively Object to Paying the Full Fee

From the first occasion this Court has had to address a challenge to the right of unions representing employees to compel payment of dues, fees and assessments, it has acknowledged that unions have traditionally used a portion of those dues for political and ideological purposes, and has predicated any grant of relief, or even recognition of a viable employee claim thereto, upon the voicing of an affirmative objection to such use by that employee. The court below has fully explicated and reaffirmed the latter premise, which underlies *all* the Supreme Court cases in this area.

The Ninth Circuit reviewed the history of this Court's treatment of this issue, and concluded that there is

> no support for the [petitioners'] position . . . that affirmative consent to deduction of full fees is required in order to protect their First Amendment rights. The Supreme Court has repeatedly held that nonunion members' rights are adequately protected when they are given the opportunity to object to such deductions and to pay a fair share fee to support the union's representation costs. [Pet.App. 6a]

In support of this conclusion concerning this Court's teachings on the issue in this case, the Ninth Circuit succinctly traversed the "long line of Supreme Court cases beginning with *International Association of Machinists v. Street*, 367 U.S. 740 (1961)": [Pet.App. 4a]

> The issue in *Street* was whether a union "receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes." 367 U.S. at 749. The Court concluded that it should not. Avoiding constitutional issues, the Court construed the provisions of the Railway Labor Act to prevent a union "over an employee's objection" from using compulsory union dues to support political causes the employee does not favor. *Id.* at 770. Dealing with whether the employee has any obligation to make an objection known, the Court said in oft-repeated language that "dissent is not presumed – it must affirmatively be made known to the union by the dissenting employee." *Id.* at 774. "The union receiving money exacted from an employee under a union shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities." *Id.*

Following the precedent set in *Street*, the Supreme Court in *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 118-19 (1963), reaffirmed the requirement that, under the RLA, an employee who objects to the union's use of his deducted funds for activities unrelated to a union's representational role must make that objection known to the union. In addition, the Court stated that "[n]o respondent who does not in the course of the further proceedings in this case prove that he objects to such use [of agency fees by the union for nonrepresentational purposes] will be entitled to relief. This is not and cannot be a class action." *Id.* at 119. The meaning of this statement is clear: under the statutory scheme created by the RLA, employees who fail to object individually to the amount of the compulsory union dues have no right to receive relief from payment of those dues.[3] Accord *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970) (on remand in action against union under the RLA, district court should

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[3] Petitioners inaccurately label the above-quoted language in *Allen* as *dicta* to avoid its dispositive effect on their argument. Pet.App. 15 n. 10. Since the *Allen* Court concluded that there was a direct connection between affirmative objection and the issue of entitlement to relief which was before it, the Court's statements concerning the requirement of affirmative objection were essential to its legal conclusions, not *dicta*.

Moreover, the Court in *Allen* clearly intended to impose the minimal burden of objecting on *nonmembers*: the Court recognized that plaintiffs before it "were *not* union members," (emphasis supplied) and noted that the union did "not insist that employees actually join the union, but regard(ed) payment of the uniform exactions required by the agreement as complete compliance with (the union security agreement)." 373 U.S. at 119 and n.3.

include as plaintiffs only those employees who raised an objection to the use of agency fees for political purposes).

In *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, 466 U.S. 435 (1984), and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Supreme Court addressed the procedures that a union should follow in order to safeguard the First Amendment rights of dissenting nonunion employees. The Supreme Court's premise continued to be that the state could constitutionally authorize the union to collect full dues provided those who objected to political or ideological expenditures would be permitted to pay an appropriately reduced share of the agency fee. The objective under the First Amendment was to "prevent[ ] compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." 475 U.S. at 302 (quoting *Abood* [*v. Detroit Board of Education*, 431 U.S. 209, 237 (1977)]).

The most recent Supreme Court decision in the area of agency fees is *Lehnert v. Ferris Faculty Ass'n*, 111 S.Ct. 1950 (1991), another case arising under Michigan's agency shop statute, and dealing with the nature of activities that could or could not be supported through the funds of objecting employees. Again, the premise remained that employees had the burden of objecting. See *id.* at 1959-60.

[Pet.App. 4a-6a]

Moreover, this Court's agency fee cases are in this regard fully consistent with other cases concerning the

First Amendment right of freedom from compelled speech. In *Wooley v. Maynard*, 430 U.S. 705, 715 (1979), this Court protected the right of New Hampshire motorists *to dissent* from the state's slogan on the license plate by obscuring it, but did not offer any protection to those who remained silent, and chose thereby to display the slogan, whether they agreed with it or not. Similarly, there is nothing discriminatory in notifying nonmembers ahead of time about the consequences of inaction, advising them of the minimal action necessary to avoid those consequences, and then treating those employees as if they understood the admonition. See Tribe, American Constitutional Law, 2d §45-5, p. 1317 n.21. In short, there is not one iota of legal authority for Petitioners' position, and no reason for this Court to consider this oft-addressed issue anew.

Further, the Ninth Circuit's conclusion and analysis concerning the question presented in this case were recently followed by the Sixth Circuit Court of Appeals in *Weaver, et al. v. University of Cincinnati*, ___ F.2d ___, 1992 U.S. App. Lexis 16717, 140 L.R.R.M. 2948 (6th Cir. July 23, 1992) (the cases leading up to and including *Abood* "stand for the proposition that dissenting union and nonunion members must inform the union that they oppose the use of their funds for ideological expenditures," relying upon the Ninth Circuit's *Mitchell* opinion).

Thus, Petitioners cannot point to a conflict among the circuits on this issue that might provide the basis for review and resolution by this Court.

In seeking to counter this Court's square holdings contrary to their position, Petitioners advocate a nonexistent and illogical contextual distinction between this case and all the Supreme Court cases to date: according to Petitioners, only *members* may be required to act affirmatively to prevent a full dues deduction. However, none of the Court's cases relied upon by the Ninth Circuit have ever suggested that such a distinction should be applied, Indeed, as the Ninth Circuit recognized, the *Abood* opinion, "which, [because it involved nonmember plaintiffs] most closely addresses [Petitioners'] situation and most clearly rejects their position. . . . " [Pet.App. 7a], "was dealing with an issue of individual constitutional rights *and held that all plaintiffs, not just those who were union members,* were required to voice their objection to payment of the full agency fee." [Pet.App. 8a] Hence, as noted in the Ninth Circuit's review of this Court's precedent, quoted *supra,* the consistent commonsense principle that underlies the entire line of cases is that if an employee wishes his objection to be addressed, he must take the elementary step necessary to make that objection known.[4] Therefore, as the Ninth Circuit concluded, from

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[4] Petitioners cannot draw support from *Chicago Teachers v. Hudson,* 475 U.S. 292 (1986), which in their view, signalled the adoption by this Court of a new meaning to the burden to object. According to Petitioners, that burden applies only to nonmembers after the "impartial decisionmaker's" proceeding commences, and then only to the *calculation* of the reduced agency fee. Pet.App. 22.

Nothing in *Hudson* supports Petitioners' view. See 475 U.S. at 306 n.16. The Court never suggested that it was altering its

Street to *Lehnert*, this Court has consistently permitted unions to require objectors of *all* stripes affirmatively to voice their objections to political and nonchargeable expenditures, rather than presuming dissent.

B. The Agency Fee Cases are Consistent with other Cases Concerning the Obligation to Voice Dissent

The Ninth Circuit appropriately analogized the Union's notice to nonmembers, which provides them with an opportunity to "opt-out" of paying full dues simply by voicing an objection, with similar "opt-out" procedures applicable under Rule 23 of the Fed. R. Civ. P. (Pet.App. 8a-9a). In both instances (and unlike the criminal context Petitioners rely upon), recipients are under no coercion or inducement whatever to forego assertion of their right to dissent once informed of the means by which to do so. The most recent case decided by this Court upholding such procedures, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), therefore concludes that it is

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unbroken line of precedents, especially *Abood*, which are fatal to Petitioners' position.

Moreover, the distinction between dissent from *calculation* of the fee and dissent from paying the full amount of union dues has no constitutional significance. The same constitutional right – to prevent undesired use of moneys for political and ideological purposes – is implicated in either act of dissent. Thus, since as even Petitioners concede, they can constitutionally be required to affirmatively object to the fee *calculation*, there is no constitutional infirmity in requiring them to affirmatively object to payment of the full fee. Pet.App. 22.

sufficient for the "opt-out" notice to provide the nonmember with an opportunity to exclude himself from the binding effect of the action which is the subject of the notice. Furthermore, as this Court noted in *Shutts*, the proven willingness of many nonmembers affirmatively to object (or in this case, to come forward to join the union) in response to the clear notices provided is a strong indication of the efficacy of the procedure. 472 U.S. at 813.[5]

Moreover, a correct application of the "knowing and intelligent" standard borrowed from the criminal law context would still yield the result that the Union's procedure was appropriately respectful of Petitioners' rights. *Johnson v. Zerbst*, 304 U.S 458 (1938). The Union informed

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[5] Petitioners rely heavily on a district court case, *Federal Election Comm'n v. National Education Ass'n*, 475 F.Supp. 1102 (D.D.C. 1978) for their claim of unconstitutionality of UTLA's agency fee practice. Aside from the fact that the case, if still valid, would obliterate Petitioners' laboriously-crafted distinction between members (who they must admit can be required to pay full dues in the absence of an affirmative objection) and nonmembers (who, they claim despite all authority to the contrary, cannot be so required), it is missing one significant distinguishing fact: in *NEA*, there was no opportunity for the members to *prevent* objectionable deductions; rather, there was only the possibility of eventual refund. In the case at bar, and in *Kentucky Educators Public Affairs Counsel v. Kentucky Registry of Election Finance*, 677 F.2d 1125 (6th Cir. 1982), where the Court of Appeals upheld a payroll checkoff for political contributions *unless* the members affirmatively opted not to contribute, there were such *preventative* opportunities afforded to employees; the Sixth Circuit distinguished *NEA* on that ground. 677 F.2d at 1132. *NEA* therefore has no application to this case.

nonmembers of their rights to object, the simple communicative act needed to preserve the right, and the consequences of a failure to object; this Court does not require more even of police interrogators. Cf. e.g., *McNeil v. Wisconsin*, 501 U.S. ___, 115 L.Ed.2d 158 (1991). Petitioners have presented no reason to apply the criminal standard, and cannot prevail even if it were applicable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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v.

UNITED TEACHERS-LOS ANGELES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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October 1992

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12pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. CONTRARY TO THE UNION'S SUGGESTION, THE PRESENTED QUESTION, INVOLVING THE GOVERNMENT'S SEIZURE OF MONIES FOR POLITICAL AND IDEOLOGICAL CAUSES FROM A CLASS OF SILENT NONMEMBER TEACHERS, HAS NEVER BEEN PRESENTED TO THIS COURT 1

II. *HUDSON* DOES NOT SUPPORT THE VIEW THAT THE STATE CONSTITUTIONALLY MAY AID PRIVATE LABOR ORGANIZATIONS BY SEIZING THE FUNDS OF SILENT NONMEMBER EMPLOYEES FOR THE UNIONS' POLITICAL AND IDEOLOGICAL ACTIVITIES 2

III. THE IMPORTANT DISTINCTION BETWEEN UNION MEMBERS AND NONMEMBERS DETERMINES WHICH EMPLOYEES MAY BE REQUIRED TO AFFIRMATIVELY VOICE THEIR OBJECTIONS TO THE UNIONS' POLITICAL, IDEOLOGICAL, AND OTHER NONBARGAINING EXPENDITURES 5

IV. APPLICATION OF THIS COURT'S ANALYSIS IN *WOOLEY* REQUIRES REVERSAL OF THE NINTH CIRCUIT'S DECISION 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 1, 5

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) ..... *passim*

Cleveland Board of Education v. Loudermill,
470 U.S. 532 (1985) 2

Ellis v. Railway Clerks, 466 U.S. 435 (1984) 1, 5

Lassiter v. Department of Social Services,
452 U.S. 18 (1981) 2

Lehnert v. Ferris Faculty Association, ___ U.S. ___,
111 S. Ct. 1950 (1991) 1

Machinists v. Street, 367 U.S. 740 (1961) ..... *passim*

Morrissey v. Brewer, 408 U.S. 471 (1972) 2

R.A.V. v. City of St. Paul, ___ U.S. ___,
112 S. Ct. 2538 (1992) 7

Railway Clerks v. Allen, 373 U.S. 113 (1963) 1

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 7

Wooley v. Maynard, 430 U.S. 705 (1977) 6

TABLE OF AUTHORITIES (continued)

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I 4, 6, 7

U.S. Const. amend. XIV 4, 7

Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983) 3

MISCELLANEOUS

Rossie Alston, *Union Discipline and Employee Rights*, 7 Lincoln Rev. 41 (1986) 5

Gary Chaison and Dileep Dhavale, *The Choice Between Union Membership and Free-Rider Status*, 13 J. Lab. Res. 355 (1992) 5

ARGUMENT

I. CONTRARY TO THE UNION'S SUGGESTION, THE PRESENTED QUESTION, INVOLVING THE GOVERNMENT'S SEIZURE OF MONIES FOR POLITICAL AND IDEOLOGICAL CAUSES FROM A CLASS OF SILENT NONMEMBER TEACHERS, HAS NEVER BEEN PRESENTED TO THIS COURT.

In the Brief in Opposition ("Opp.") at 5-11, Respondent United Teachers-Los Angeles ("UTLA") contends this Court previously adjudicated the issue presented in the Petition adversely to the Petitioners and the class of silent nonmembers. UTLA claims this Court has "predicated any grant of relief, or even recognition of a viable employee claim thereto, upon the voicing of an affirmative objection to such use by that employee." Opp. at 5. This representation is spurious.

The narrow question raised here has never been presented to this Court because, unlike Petitioners, none of the *nonmember* employees involved in the "long line of Supreme Court union security and agency shop cases" has ever challenged the "requirement" that he or she object to the payment of the unions' political, ideological, and other nonbargaining expenses as a condition of preventing the automatic seizure of those monies from his or her wages. *E.g.*, Brief for Respondents at 6-7, *Railway Clerks v. Allen*, 373 U.S. 113 (1963) (No. [62-]316).

Indeed, the nonmembers in the prior cases had made their objections known to the unions in one way or another. *Lehnert v. Ferris Faculty Ass'n*, ___ U.S. ___, ___, 111 S. Ct. 1950, 1956 (1991); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 297 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 439 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 212-14 (1977); *Railway Clerks v. Allen*, 373 U.S. 113, 118-19 & n.6 (1963); and *Machinists v. Street*, 367 U.S. 740, 744 (1961). Thus, the critical issue presented here has not been directly or intentionally decided in any of the earlier cases.

II. *HUDSON* DOES NOT SUPPORT THE VIEW THAT THE STATE CONSTITUTIONALLY MAY AID PRIVATE LABOR ORGANIZATIONS BY SEIZING THE FUNDS OF SILENT NONMEMBER EMPLOYEES FOR THE UNIONS' POLITICAL AND IDEOLOGICAL ACTIVITIES.

Unlike the Ninth Circuit, which did not address the district court's reliance on this Court's decision in *Hudson*, UTLA (Opp. at 10-11 n.4) claims that *Hudson* supports the Ninth Circuit's reversal of the district court's injunction against the government's automatic seizure of nonmembers' wages for the unions' political and ideological agenda. UTLA suggests that because *Hudson*, 475 U.S. at 306 & n.16, cites *Street*, 367 U.S. at 774, for the proposition that "dissent is not to be presumed," this Court validated the proposition that "the state could constitutionally authorize the union to collect full dues" from silent nonmembers. Opp. at 8, quoting Pet., App. A at 6a.[1] UTLA's reliance is misplaced.

UTLA wants to interpret this Court's use of "dissent" without considering the different factual context in which *Hudson* used it. This cannot be done.[2] In *Street* this Court

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[1] The Ninth Circuit and UTLA ignore the nature of the state's involvement in the constitutional infringement of enforcing the agency shop by discussing "the nonmembers['] ... obligation to **pay** an agency fee," Pet., App. A. at 2a (emphasis added), and "payroll deductions." *Id.* at 3a. In fact, the district court properly recognized that the school district affirmatively facilitates the constitutional infringement by involuntarily seizing agency fees from the pay of all nonmember teachers without their authorization and automatically deducts monies for political and ideological purposes from the silent teachers. Pet., App. C at 19a-20a.

[2] *See Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25 (1981) (application of the due process clause requires consideration of several interests at stake in a particular situation); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("[T]he question remains what process is due" in a particular context), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

mandated that an employee's "dissent" from initially paying full dues and supporting all union activities, including its political and other nonbargaining activities, was "not to be presumed"—where the employees at issue were union members. However, that same conclusion cannot be reached from an examination of the language and facts of *Hudson*.

In *Hudson*, there was no need for nonmembers to "dissent" within the meaning of *Street*, 367 U.S. at 774, since the statute at issue only authorized the exaction of the employee's "proportionate share of the cost of the collective bargaining process and contract administration," not full union dues. *Hudson*, 475 U.S. at 295 & n.1, quoting Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983). Unlike the collective bargaining agreement in *Street*, which authorized the employer to require the payment of full union dues, the collective bargaining agreement in *Hudson* only authorized the public employer to seize from the nonmembers a fee equal to the employees' *pro rata* share of the union's costs of collective bargaining, contract administration, and grievance adjustment, which the union initially calculated as 95% of full union dues. 475 U.S. at 295-96. Thus, a requirement for objection to the exaction of full union dues, including monies for political and ideological purposes, was not and could not have been adjudicated in *Hudson*, because this Court was presented with facts,[3] a statute, and a collective bargaining agreement

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[3] Under the union's procedure in *Hudson*, the only objection mentioned was an objection to the calculation of the "proportionate share" deduction.

> For the 1982-1983 school year, the Union determined that the "proportionate share" assessed on nonmembers was 95% of union dues. At that time, the union dues were $17.35 per month for teachers . . . ; the corresponding deduction from the nonmembers' checks thus amounted to $16.48 . . . .
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> . . .
>
> The Union also established a procedure for considering objections by nonmembers. . . . After the deduction was made, a nonmember could object to the "proportionate share" figure by

which did **not** authorize the exaction of full union dues/fees from nonunion employees.

In establishing the notice and procedural guarantees necessary under the First and Fourteenth Amendments for the constitutional collection of agency fees, this Court in *Hudson*, 475 U.S. at 306, 320, referenced the "dissent" of *Street* and the nonmember's obligation to raise an "objection" in the quite rational context of triggering a **challenge** to the union's calculation of the reduced fee. Since the Court was requiring, for the first time, that labor organizations provide the opportunity to challenge the amount of the reduced fee before an impartial decisionmaker, *Hudson*, 475 U.S. at 307 & n.19, it is hardly surprising that this Court required nonmembers, like all litigants, to take affirmative steps to invoke that quasi-adjudicative process. Moreover, any question of whether the nonmembers in that case had to "dissent" to avoid liability for full union dues would have been pure *dicta*, unjustified by any facts or law necessary to resolve the issues of the case. Thus, the district court, not the Ninth Circuit and the unions, correctly understood the context in which the *Street* "burden" to raise an objection is stated in *Hudson*.[4] *See* Pet., App. C at 22a.

> writing to the Union President . . . . The objection then would meet a three-stage procedure. . . . If an objection was sustained at any stage of the procedure, the remedy would be an immediate reduction in the amount of future deductions for all nonmembers and a rebate for the objector.

475 U.S. at 295-96.

[4] Nevertheless, Petitioners do not contend that *Hudson* has adjudicated this question. *See* § I, *supra*, at 1. Instead, while the decision in *Hudson* does not finally dispose of this question but merely lends support to Petitioners' argument, its language certainly does not support the proposition that *Hudson* validated the position taken by the Ninth Circuit and the Respondent.

III. THE IMPORTANT DISTINCTION BETWEEN UNION MEMBERS AND NONMEMBERS DETERMINES WHICH EMPLOYEES MAY BE REQUIRED TO AFFIRMATIVELY VOICE THEIR OBJECTIONS TO THE UNIONS' POLITICAL, IDEOLOGICAL, AND OTHER NONBARGAINING EXPENDITURES.

The question of first impression presented in this case is whether a **nonmember's** "dissent is not to be presumed." *Street*, 367 U.S. at 774. Petitioners concede—as *Street* requires—it is perfectly rational that a union **member's** dissent to the collection and expenditure of monies for political, ideological, and other nonbargaining activities should not be presumed. After all, a union member takes affirmative steps to affiliate himself or herself with a labor organization.[5] Thus, when presented with litigants who were union members seeking broad relief from union coercion, and with the question of the appropriate extent of the relief to be granted, where an employee has assumed the mantle of union membership, this Court correctly required a showing that to be entitled to relief such members had to "affirmatively ... ma[k]e known" their objection to the union. 367 U.S. at 774.

Then, in both *Abood*, 431 U.S. at 213 n.2, and *Ellis*, 466 U.S. at 438 n.2, this Court was presented with a mixed group of employees, including both members of the union who objected to supporting the union's political and ideological activities and nonmembers who also objected **but did not contest the "objection requirement."** Accordingly, this Court merely repeated its admonition in *Street*, that dissent is not presumed. However,

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[5] It is clear that "there are good reasons for employees to join the union which represents their bargaining unit." Rossie Alston, *Union Discipline and Employee Rights*, 7 Lincoln Rev. 41, 44 (1986); *see also* Gary Chaison and Dileep Dhavale, *The Choice Between Union Membership and Free-Rider Status*, 13 J. Lab. Res. 355, 360-63 (1992) (identifying three factors which may "increase the relative attractiveness of union membership" in a Right–to–Work state).

contrary to the wishes of the Respondent and the Ninth Circuit, *see* Opp. at 10-11, this Court's failure to limit its "objection requirement" to union members in those cases is not preclusive to Petitioners who **now** contest that their "dissent is not to be presumed" and any requirement that **nonmembers** must object.

IV. APPLICATION OF THIS COURT'S ANALYSIS IN *WOOLEY* REQUIRES REVERSAL OF THE NINTH CIRCUIT'S DECISION.

UTLA's reliance, Opp. at 8-9, upon this Court's decision in *Wooley v. Maynard*, 430 U.S. 705 (1977), is sorely misplaced.[6] *Wooley* found the imposition of criminal sanctions for obscuring a state's motto on license plates issued and placed upon private automobiles to be repugnant to the First Amendment. This Court applied a two-pronged analysis in reaching its conclusion. First, the individuals' interests must implicate First Amendment protections. Second, "the State's countervailing interest [must be] sufficiently compelling to justify" the First Amendment infringement. *Id.* at 716-17. In *Wooley*, the State's countervailing interest was found wanting. *Id.*

Likewise, there is neither a sufficiently compelling countervailing government interest, nor any rational justification, to support the proposition that public school districts may compel employees who are nonmembers of a labor organization and make no response to a union mailing to financially support the union's political and nonbargaining activities. Neither the Ninth Circuit nor UTLA identifies, nor could they, any such governmental interest. Thus, the *Wooley* two-pronged analysis supports the district court's injunction, not the Ninth Circuit's reversal.

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[6] *Wooley* is also irrelevant to the question presented here because, as in the previous agency shop cases, those who remained silent did not seek any protection from the proposition that "dissent is not presumed." Likewise, Professor Tribe's comments about *Wooley* are irrelevant.

Furthermore, the analysis of UTLA and the Ninth Circuit is precisely the reverse of the appropriate First Amendment analysis. In arguing that this Court's decisions limit "the [r]ight to [p]ay a [r]educed [a]gency [f]ee to those [n]onmembers who [a]ffirmatively [o]bject to [p]aying the [f]ull [f]ee," Opp. at 5, UTLA wrongly suggests that the nonmember's right to be free from compelled speech—the right to refrain from political speech and association, *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)—does not survive the imposition of an agency fee requirement. Under this Court's First and Fourteenth Amendment jurisprudence, a nonmember's pre-existing right to refrain from supporting a labor organization's political, ideological, and nonbargaining activities cannot be burdened by requiring the nonmember to affirmatively object to supporting the union's political and ideological activities, **especially since the nonmember has already refrained from or refused to support *any* of the labor organization's activities.** The First Amendment does not allow mere government fiat to countenance burdening the exercise of the right to be free from compelled association—even to the extent of requiring nonmembers to voice an objection!

The source for the argument that labor organizations should be permitted to presume the support of nonmembers for their political, ideological, and nonbargaining agenda is self-evident, and cannot be cloaked in any mantle of neutral principles. The only rational reason why state and local officials would provide for such a presumption, instead of affirmative consent, is that government ***prefers*** the political and ideological speech of labor organizations, contrary to the restrictions on government power imposed by the First and Fourteenth Amendments. *See R.A.V. v. City of St. Paul*, ___ U.S. ___, ___, 112 S. Ct. 2538, 2547 (1992); Petition at 12, 16-17 & n.12, 25-26.[7]

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[7] It is most revealing that UTLA also failed to discuss *R.A.V.* and the abuse of governmental power in automatically seizing monies from its employees to support the unions' political and ideological agenda.

CONCLUSION

The petition should be granted as to the question presented.

Respectfully submitted,

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